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In The

Supreme Court of the United States

October Term, 1996

KIMBERLY S. SAAVEDRA, as Special Administratrix of The Estate of Masakazu Yamaguchi, et al.,

Petitioners,

v.

KOREAN AIR LINES CO., LTD.,

Respondent.

KIMBERLY S. SAAVEDRA, as Special Administratrix of The Estate of Makoto Okai and Yooko Okai, et al.,

Petitioners,

v.

KOREAN AIR LINES CO., LTD.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

While this appeal was pending in the court below, the Court decided *Zicherman v. Korean Air Lines*, 116 S. Ct. 629 (1996) which arose out of the same air carrier disaster as the instant appeal. *Zicherman* held that the types of recoverable damages in an action governed by the Warsaw Convention* must be determined by reference to domestic law and, where a death occurs on the high seas, DOHSA** applies as the measure of the wrongful death remedy, which disallows loss of society damages.

Also while this appeal was pending in the court below, the Court decided *Yamaha Motor Corp. v. Calhoun*, 116 S. Ct. 619 (1996) which held that state law remedies may be applied to supplement general maritime law under *Moragne**** for deaths that occur in territorial waters and assumed without deciding that *Moragne* encompasses a survival cause of action. Thus, the Court inherently identified the distinction between wrongful death action remedies and survival action remedies.

In this action, the court below disallowed nonpecuniary damages for the decedents' predeath pain and suffering under DOHSA on the basis of the Courts' *Zicherman* decision but did not distinguish between the general

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* Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* note following 49 U.S.C. § 40105.

** Death on the High Seas Act (DOHSA), 41 Stat. 537 (1988), 46 U.S.C. App. 761 *et seq.* (1988).

*** *Moragne v. States Marine Lines*, 398 U.S. 375 (1970).

QUESTIONS PRESENTED FOR REVIEW – Contined

maritime law survival action remedies on the one hand and wrongful death remedies under DOHSA on the other. It decided the substantive issue of the legal availability of a claim for predeath pain and suffering notwithstanding the fact that KAL had not raised the issue in its initial briefs. And it disallowed damages for survivors' grief under 46 U.S.C. App. § 764.

The questions presented for review are:

1. Does the general maritime law of the United States recognize a survival cause of action for predeath pain and suffering? If yes, may it be brought simultaneously with a separate wrongful death cause of action governed by the Death on the High Seas Act?

2. Are §§ 761/62 and § 764 of the Death on the High Seas Act cumulative where the vessel is a foreign flagship such that, if the law of the flag of the vessel permits a recovery for the decedent's predeath pain and suffering and for beneficiaries' mental anguish and grief as a wrongful death recovery, the same may be recovered in American courts?

3. Should the Ninth Circuit's review of the legal availability of the general maritime law survival action have been barred by the doctrine of issue preclusion?

LIST OF PARTIES IN THE PROCEEDING BELOW

A. PETITIONER

Petitioner Kimberly S. Saavedra, as Personal Representative of the Estates of Masakazu Yamaguchi, Makoto Okai, and Yooko Okai, respectively, is an individual.

B. RESPONDENT

Respondent Korean Air Lines Co., Ltd. is a member of the Hanjin Group of Korea, which comprises companies under common management direction. The 23 affiliated companies of the Hanjin Group are:

Hanjin Transportation Co., Ltd.
Hanil Development Co., Ltd.
Hanjin Shipping Co., Ltd.
Jungsuck Enterprise Co., Ltd.
Korea Air Terminal Service Co., Ltd.
Air Korea Co., Ltd.
Jedong Industries, Ltd.
Hanjin Travel Service Co., Ltd.
Hanjin Construction Co., Ltd.
Korea Freight Transportation Co., Ltd.
Hanjin Data Communications Co., Ltd.
Hanil Leisure Co., Ltd.
Hanjin Information Systems & Telecommunications Co., Ltd.
Pyung Hae Mining Development Co., Ltd.
Cheju Mineral Water Co., Ltd.
Union Express, Ltd.
Hanjin Heavy Industries Co., Ltd.
Femtco Shipping Co., Ltd.
Oriental Fire & Marine Insurance Co., Ltd.
Korean French Banking Corporation-SOGEKO
Hanjin Investment & Securities Co., Ltd.
Inha University Foundation
Jungsuck Foundation

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

PROVISIONS OF LAW INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 6

ARGUMENT 8

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTS IN THE CIRCUITS WHETHER A GENERAL MARITIME LAW SURVIVAL ACTION EXISTS AND WHETHER IT MAY BE JOINED WITH A WRONGFUL DEATH ACTION UNDER DOHSA 8

II. CERTIORARI SHOULD BE GRANTED TO CORRECT THE NINTH CIRCUIT'S MISAPPLICATIONS OF THIS COURT'S DECISION IN *MOBIL OIL CORP., MILES*, AND *ZICHERMAN* 10

III. CERTIORARI SHOULD BE GRANTED TO ADDRESS THE CONFLICT IN THE DISTRICT COURTS' INTERPRETATIONS OF 46 U.S.C. APP §§ 761/62 AND § 764 12

IV. CERTIORARI SHOULD BE GRANTED TO BAR KAL'S BELATED APPEAL BY THE DOCTRINE OF ISSUE PRECLUSION 14

V. NUMEROUS CASES ARISING OUT OF AIR DISASTERS AWAIT A DEFINITIVE RULING ON RECOVERABLE DAMAGES IN SIMILAR CIRCUMSTANCES 15

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Azzopardi v. Ocean Drilling Exploration Co., 742 F.2d 890 (5th Cir. 1984) 9

Barbe v. Drummond, 507 F.2d 794 (1st Cir. 1974) 9

Bergeron v. Koninklijke Luchtonart Maatschappij, N.V., 188 F. Supp. 594 (S.D.N.Y. 1960) 12

Bickel v. Korean Air Lines, 83 F.3d 127 (6th Cir. 1996), *amended on reh'g*, ___ F.3d ___, 1996 WL 490375 (6th Cir. Aug. 29, 1996) 5, 7, 13, 14

Bowden v. Korean Air Lines, 814 F. Supp. 592 (E.D. Mich. 1993) 13

Chute v. United States, 466 F. Supp. 61 (D. Mass. 1978) 9

Evich v. Connelly, 759 F.2d 1432 (9th Cir. 1985) 10

Evich v. Morris, 819 F.2d 256 (9th Cir.), *cert. denied*, 484 U.S. 914 (1987) 10

Favoloro v. S/S Golden Gate, 687 F. Supp. 475 (N.D. Cal. 1987) 9

Forman v. Korean Air Lines, 84 F.3d 446 (D.C. Cir. 1996) 5, 7, 13, 14

Gray v. Lockheed Aeronautical Systems Co., 880 F. Supp. 1559 (N.D. Ga. 1995) 9

Heath v. American Sail Training Assoc., 644 F. Supp. 1459 (D.R.I. 1986) 12

In re Air Crash Disaster New Bombay, India on January 1, 1978, 531 F. Supp. 1175 (W.D. Wash. 1982) 12

TABLE OF AUTHORITIES – Continued

Page

In re Air Disaster at Locherbie, Scotland on December 21, 1986, 928 F.2d 1267, *cert. denied, sub. nom. Rein v. Pan American World Airway, Inc.*, 502 U.S. 920 (1991) 13

In re Air Disaster at Locherbie, Scotland on December 21, 1988, 37 F.3d 804 (C.A.2. 1994), *cert. denied, sub. nom. Pan American Airways, Inc. v. Pagnucco*, 115 S. Ct. 934 (1995) 13

In re Inflight Explosion on TWA Aircraft Approaching Athens, Greece on Apr. 2. 1986, Ospina v. TWA, 778 F. Supp. 625 (E.D.N.Y. 1991), *rev'd on other grds*, 975 F.2d 35 (2d Cir. 1992), *cert. denied*, 507 U.S. 1051 (1993) 13

In re Korean Air Lines Disaster of September 1, 1983, 814 F. Supp 592 (E.D. Mich. 1992) 12

Kuntz v. Windjammer "Barefoot" Cruises, Ltd., 573 F. Supp. 1277 (W.D. Pa. 1983) 9

Law v. Sea Drilling Corp., 523 F.2d 793 (5th Cir. 1975) 9

McAleer v. Smith, 791 F. Supp. 923 (D.R.I. 1992) 9

Miles v. Apex Marine Corp., 498 U.S. 19, 111 S. Ct. 317 (1990) 6, 10, 11

Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978) ..6, 10

Moragne v. States Marine Lines, Inc., 398 U.S. 375, 26 L.Ed. 3d 339, 90 S. Ct. 1772 (1970) 6, 8, 9

Noel v. Linea Aeropostal Venezolana, 260 F. Supp. 1002 (S.D.N.Y. 1966) 12

TABLE OF AUTHORITIES – Continued

Page

Powers v. Cunard S.S. Co., 32 F. Supp. 720 (S.D.N.Y. 1925) 12

Rye v. United States Steel Mining Co. Inc., 856 F. Supp. 274 (E.D. Va. 1994) 9

Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974) 6

Spiller v. Thomas M. Lowe, Jr. Assoc., Inc., 466 F.2d 903 (8th Cir. 1972) 10

Yamaha Motor Corp. v. Calhoun, 40 F.3d 622 (3d Cir. 1994) 6, 9

Zicherman v. Korean Air Lines, 116 S. Ct. 629 (1996) 2, 5, 6, 10, 11, 13, 14

TREATIES, STATUTES AND RULES

The Warsaw Convention, Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), reprinted in note following 49 U.S.C. § 40105 2

Death on the High Seas Act (DOHSA), 41 Stat. 537 (1988), 46 U.S.C. App. § 761 *et seq.* 2

PETITION FOR WRIT OF CERTIORARI

Petitioner Kimberly S. Saavedra, as Special Administrator of the Estates of Makoto Okai, deceased; Yooko Okai, deceased; and Masakazu Yamaguchi, deceased, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals of the Ninth Circuit entered on August 2, 1996.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 93 F.3d 547 (9th Cir. 1996). It is also reproduced in the Appendix to this Petition at A1a-22a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 2, 1996 and Petitioner's timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was rejected on September 9, 1996. A23a-24a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the Court of first instance was pursuant to 28 U.S.C. § 1331, Federal Question Jurisdiction, and 28 U.S.C. § 1332, Diversity of Citizenship Jurisdiction.

PROVISIONS OF LAW INVOLVED

This case arises under the Warsaw Convention, formally known as The Convention for Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, T.S. No. 876 (1934), reprinted in 49 U.S.C. § 40105 note. Because the locus of the deaths was on the high seas, the survival cause of action is governed by general maritime law and the wrongful death cause of action is governed by the Death on the High Seas Act (DOHSA), 41 Stat. 537 (1988 ed.), 46 U.S.C. App. § 761 *et seq.* 1988.

STATEMENT OF THE CASE

Petitioner is the Personal Representative of the estates of three passengers who were killed when Korean Air Lines Flight 007 was shot down over the Sea of Japan on September 1, 1983. *See generally, Zicherman v. Korean Air Lines*, 116 S. Ct. 629 (1996). Following the resolution of liability issues, the within cases were remanded to the Central District of California for damages trials against Korean Air Lines Co., Ltd. ("KAL"). The *Saavedra/Yamaguchi* case was tried to a jury and judgment was entered on October 20, 1993. The *Saavedra/Okai* cases, which were consolidated actions brought on behalf of husband and wife decedents, were tried before another jury, and judgment was entered on February 4, 1994.

In the *Saavedra/Okai* cases, the jury awarded wrongful death damages to the individual beneficiaries in the total following amounts:

Loss of support – $200,000

Mental anguish and grief – $150,000

Loss of society – $300,000

Funeral expenses – $29,583

The jury also awarded survival action damages to the personal representative of each estate in the amount of $750,000 per decedent.

In the *Saavedra/Yamaguchi* case, the jury awarded wrongful death damages to the individual beneficiaries in the total following amounts:

Loss of support – $1,813,391

Loss of services – $114,570

Mental anguish and grief – $526,000

Funeral expenses – $16,500

The jury also awarded survival action damages to the personal representative of the estate of Masakazu Yamaguchi in the amount of $100,000.

The District Courts then computed prejudgment interest on the respective amounts and entered final judgment.

Korean Air Lines appealed the *Saavedra/Okai* verdicts to the court below on the grounds that the District Court erred (1) in permitting the jury to assess loss of society damages; (2) in allowing damages for the survivors' grief; (3) that the verdicts for the decedents predeath pain and suffering were not supported by sufficient evidence and were excessive; and, (4) that the awards for loss of support to the decedents' parents were not supported by

substantial evidence. KAL did not appeal the legal availability of the survival action claim for predeath pain and suffering.

Plaintiff *Saavedra/Okai* appealed the failure of the District Court to enter the verdicts for loss of society damages and the application of the prejudgment interest rate.

Korean Air Lines appealed the *Saavedra/Yamaguchi* verdict to the court below on the grounds that: (1) the District Court erred when it allowed damages for the survivors' grief; (2) that the awards for the survivors' grief were not supported by sufficient evidence and were excessive; and, (3) that the verdict for predeath pain and suffering was not supported by sufficient evidence. KAL did not appeal the legal availability of the survival action claim for predeath pain and suffering.

Plaintiff *Saavedra/Yamaguchi* cross-appealed on the grounds that the District Court erred when it denied the right to assert loss of society damages and on its application of the prejudgment interest rate.

The appeals were still pending in the Ninth Circuit when this Court entered its decision in *Zicherman*, which involved claims also arising from the KAL Flight 007 catastrophe but which only addressed the issue of the legal availability of loss of society damages in a Warsaw-governed case which had its wrongful death remedy created by the Death on the High Seas Act. KAL requested permission of the Ninth Circuit to file a supplemental brief. The Ninth Circuit permitted all parties to file supplemental briefs limited to the effect of the *Zicherman* decision on the pending appeals.

The Ninth Circuit reversed the District Court's award of survival action damages for decedents' predeath pain and suffering and reversed the District Court's award of damages for the survivors' mental anguish and grief.[1]

In its decision, the lower court cited *Bickel v. Korean Air Lines*, 83 F.3d 127, 132 (6th Cir. 1996), *amended on reh'g*, ___ F.3d ___, 1996 WL 490375 (6th Cir. Aug. 29, 1996), a Sixth Circuit decision addressing identical issues which originally held that survival action damages were not cognizable. However, on August 29, 1996, the Sixth Circuit reversed itself in an amended opinion not cited by the court below and held that KAL had waived its right to appeal the issue because it had initially failed to challenge the propriety of the award in its briefs. *Id. amended decision Aug. 29, 1996*. Similarly, the D.C. Circuit refused to address the issue of the legal availability of survival action damages on the grounds that KAL had failed to raise it initially. *Forman v. Korean Air Lines*, 84 F.3d 446, 448-49 (D.C. Cir. 1996), Petition for Writ of Certiorari filed October 3, 1996, Docket No. 96-530.

Saavedra, the personal representative of the estates of Masakazu Yamaguchi, Makoto Okai, and Yooko Okai, in her capacity as Personal Representative of the estates and in her fiduciary capacity on behalf of the individual beneficiaries now petitions this Court for a writ of certiorari.

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[1] It also eliminated damages for loss of society per *Zicherman*, affirmed loss of support damages, and affirmed a prejudgment interest award.

REASONS FOR GRANTING THE PETITION

There are five compelling grounds for this court to grant certiorari and review the decision below.

1. A conflict now exists among circuit courts as to whether a general maritime law survival cause of action for a decedent's predeath pain and suffering exists and, if so, if it may co-exist with a wrongful death cause of action under the Death on the High Seas Act. As this court noted in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 34 (1990), several Courts of Appeal have identified that there is a general maritime right of survival. And in *Yamaha Motor Corp v. Calhoun*, 116 S. Ct. 619, 625 n.7 (1996), this Court assumed without deciding that a general maritime law survival cause of action is created by *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), citing *Miles, supra*. Given that this Court has never directly addressed the issue, the Courts of Appeals for the First, Fifth and Eighth Circuits have taken guidance from the Court's inferences in *Miles* and *Moragne* and identified a general maritime survival action. The Ninth Circuit stands alone in its rejection of the survival cause of action as against each of its sister circuits which have addressed the issue. The Ninth Circuit's decision, unlike those of the other Circuits, ignores the distinction between the survival cause of action and the wrongful death cause of action, which this Court has itself specifically identified. *Sea-Land Service, Inc. v. Gaudet*, 414 U.S. 573, 575-76, n.2 (1974).

2. The decision below misapplied this Court's opinions in *Mobile Oil Corp v. Higginbotham*, 436 U.S. 618 (1978) and *Zicherman*, each of which addressed only

wrongful death remedies, by focusing solely on DOHSA's limitations on nonpecuniary damages to the improper exclusion of the separate survival cause of action. The misinterpretation will cause significant confusion among the lower courts unless clarified by this Court.

3. There is a conflict at the district court level that interprets §§ 761/62 and § 764 of the Death on the High Seas Act. Some district courts have permitted claims brought under foreign law where the flag of the vessel is foreign to be supplemented with claims brought under United States statutes. Other district courts require a choice of either foreign law or American law. No circuit court has addressed the issue. Given the dearth of decisions, this Court should clarify these issues, particularly given the *Zicherman* decision applying DOHSA in Warsaw Convention cases and the greater likelihood of § 764 being applied to air accidents involving foreign carriers.

4. KAL should be barred from challenging the issue of the legal availability of a survival action by the doctrine of "issue preclusion." KAL did not initially raise the issue on appeal and the result places Petitioner in a dramatically opposite position as others whose cases were appealed to the Sixth and District of Columbia Circuits. In other actions arising out of the same KAL Flight 007 catastrophe, the Sixth Circuit in *Bickel, supra,* and the District of Columbia Circuit in *Forman, supra,* have affirmed the decedents' estates' recoveries for predeath pain and suffering under identical facts and state of the law as faced the Ninth Circuit. Justice is not served by barring these claims in the Ninth Circuit while permitting them under *identical* circumstances in the Sixth and District of Columbia Circuits.

5. There are still 25 cases pending in the District and Circuit Courts arising from the KAL disaster that would benefit from this Court's answer to the issues raised. Moreover, the Death on the High Seas Act may arguably be applied to claims arising from the TWA Flight 800 disaster which occurred off the coast of New York on July 17, 1996 in which 230 persons perished. That flight was also governed by the Warsaw Convention. Potentially 230 wrongful death and survival claims may be brought in United States courts. The issues raised are not isolated to scarce cases. This Court should provide definitive guidance on the elements of damage to prevent conflicting and inconsistent results.

ARGUMENT

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTS IN THE CIRCUITS WHETHER A GENERAL MARITIME LAW SURVIVAL ACTION EXISTS AND WHETHER IT MAY BE JOINED WITH A WRONGFUL DEATH ACTION UNDER DOHSA

Certiorari should be granted to determine that a general maritime survival cause of action exists under an analysis akin to that in *Moragne*, which identified a general maritime law wrongful death cause of action. The traditional maritime rule disallowing a survival right has been changed by the widespread acceptance of a survival cause of action for predeath pain and suffering. *See,*

Yamaha Motor Corp., supra, 116 S. Ct. at 625 n.7 (1996) (" . . . we assume without deciding that *Moragne* also provides a survival action.")

Once the Court identifies that a survival right exists, it should resolve the conflict in the Circuits created by the court below and state that the survival action may co-exist with a DOHSA death action and that DOHSA limitations on nonpecuniary damages do not abrogate survival action remedies.

The Ninth Circuit's denial of a general maritime law survival cause of action where the wrongful death cause of action arises under DOHSA contravenes decisions exactly to the contrary in the First Circuit, *Barbe v. Drummond,* 507 F.2d 794, 799-800 (1st Cir. 1974), and the Fifth Circuit, *Azzopardi v. Ocean Drilling and Exploration Co.,* 742 F.2d 890, 893 (5th Cir. 1984), *Law v. Sea Drilling Co.,* 523 F.2d 793, 794-95 (5th Cir. 1975) each of which dealt with a survival action in the context of the death action arising under DOHSA.[2] The Ninth Circuit decision also contravenes the logic and legal analysis of the Eighth Circuit, which permitted a general maritime survival action to be joined with a *Moragne* general maritime death action. *See,*

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[2] Several district courts have also found a general maritime law survival cause of action which may be brought simultaneously with a DOHSA death action; *Gray v. Lockheed Aeronautical Systems Co.,* 880 F. Supp. 1559, 1569 (N.D. Ga. 1995); *Rye v. United States Steel Mining Co., Inc.,* 856 F. Supp. 274, 279 (E.D. Va. 1994); *Chute v. United States,* 466 F. Supp. 61, 69 (D. Mass. 1978); *Kuntz v. Windjammer "Barefoot" Cruises, Ltd.,* 573 F. Supp. 1277, 1285 (W.D. Pa. 1983); *Favoloro v. S/S Golden Gate,* 687 F. Supp. 475, 479 (N.D. Cal. 1987); *McAleer v. Smith,* 791 F. Supp. 923 (D.R.I. 1992).

Spiller v. Thomas M. Lowe, Jr. Assoc., Inc., 466 F.2d 903, 909 (8th Cir. 1972). Moreover, the court below had previously joined the other circuits in their unanimous acknowledgment of the survival cause of action and had to reverse its own precedent with its *Saavedra* opinion. *Evich v. Connelly*, 759 F.2d 1432, 1434 (9th Cir. 1985); *Evich v. Morris*, 819 F.2d 256 (9th Cir.), *cert. denied*, 484 U.S. 914 (1987)

By its *Saavedra* decision, the Ninth Circuit places itself apart and singularly alone from its sister circuits.

II.

CERTIORARI SHOULD BE GRANTED TO CORRECT THE NINTH CIRCUIT'S MISAPPLICATIONS OF THIS COURT'S DECISION IN *MOBIL OIL CORP., MILES,* AND *ZICHERMAN*

The rationale that the Ninth Circuit used to substantiate its decision shows a fundamental misperception of this Court's decisions in *Mobil Oil Corp.* and *Zicherman*. Each of those decisions related to whether a particular type of *wrongful death* element of damage was available in a DOHSA wrongful death action, e.g., loss of society. Here, the type of damage at issue, i.e., the recovery for the decedent's pain and suffering, is peculiarly a survival action remedy, not a wrongful death remedy. The Court below glossed over the distinction between wrongful death actions and survival actions by stating that this Court in *Zicherman* gave "no indication that there was any material difference between loss of society damages and any other non-pecuniary damages, all of which DOHSA expressly disallows." A19a. It ignored that

plaintiffs asserted the right to predeath pain and suffering damages under general maritime law, *not* under DOHSA.

The Ninth Circuit also misapprehends this Court's decision in *Miles, supra*. The *Saavedra* Court read *Miles* as disallowing a survival claim but without limiting the holding to only barring a claim for lost future wages, and without noting the grounds for the denial used by this Court, i.e., that a claim for lost future wages had not found widespread acceptance in the states and federal analogues. The *Miles* Court did note, however, that several Circuits had identified a general maritime survival action and cited Circuit decisions that had found the right included claims for predeath pain and suffering, which *had* been widely adopted and accepted. 498 U.S. at 34. Indeed, the *Miles* Court had been asked to do what petitioner now requests and to specifically acknowledge a general maritime survival action. *Miles* declined to do so only because it was unnecessary to the narrow issue presented there. *Id.* Certiorari should be granted to answer this important question that has been pending unanswered since *Miles*.

Lastly, the *Saavedra* Court misapprehends the Court's recent decision in *Zicherman*. The *Zicherman* court addressed typical wrongful death damages. In this case, petitioner is not seeking to "supplement" statutory wrongful death damages. Rather, she is seeking acknowledgment of the propriety of asserting a distinct survival cause of action remedy with whatever damages are permissible under the death cause of action.

III.

CERTIORARI SHOULD BE GRANTED TO ADDRESS THE CONFLICT IN THE DISTRICT COURTS' INTERPRETATIONS OF 46 U.S.C. APP. §§ 761/62 AND § 764

The Death on the High Seas Act was enacted in 1920. In the more than 75 years of its existence, no appellate level court has addressed the interplay between §§ 761/62 and § 764 of DOHSA. Sections 761/62 generally give the personal representative of a decedent killed on the high seas the right to bring an action in the district courts sitting in admiralty. Section 764 addresses rights of action given by laws of foreign countries and authorize such actions in the district courts sitting in admiralty "without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary is notwithstanding."

There are two lines of authority addressing this issue at the district court level. Some district courts have permitted claims under foreign law to be cumulative with claims brought under American statutes where the vessel is of a foreign flag. *See, e.g., Powers v. Cunard S.S. Co.*, 32 F. Supp. 720 (S.D.N.Y. 1925); *Noel v. Linea Aeropostal Venezolana*, 260 F. Supp. 1002 (S.D.N.Y. 1966); *Heath v. American Sail Training Assoc.*, 644 F. Supp. 1459 (D.R.I. 1986). Other courts have treated § 764 as a choice of law provision that requires that either foreign law or American law be applied. *Bergeron v. Koninklijke Luchtonart Maatschappij, N.V.*, 188 F. Supp. 594 (S.D.N.Y. 1960), *appeal dismissed*, 299 F.2d 78 (2nd Cir. 1962); *In re Korean Air Lines Disaster of September 1, 1983*, 814 F. Supp 592 (E.D. Mich. 1992); *In re*

Air Crash Disaster New Bombay, India on January 1, 1978, 531 F. Supp. 1175 (W.D. Wash. 1982).

In *Zicherman*, this Court noted Article 17 of the Warsaw Convention was a pass-through that dictated a traditional choice of law analysis. *Zicherman, supra*, 116 S. Ct. at 636. If that analysis resulted in application of American law and the death occurred on the high seas, DOHSA would govern wrongful death issues. Thus, *Zicherman* changed the state of the law with regard to wrongful death damages as previously the courts had universally held that Article 17 of the treaty created its own cause of action with "damages sustained" being the appropriate measure of damages, further defined by reference to common law. *See, e.g., Zicherman; In re Air Disaster at Locherbie, Scotland on December 21, 1988*, 928 F.2d 1267, *cert. denied sub. nom., Rein v. Pan American World Airway, Inc.*, 502 U.S. 920 (1991); *In re Air Disaster at Locherbie, Scotland on December 21, 1988*, 37 F.3d 804 (C.A.2. 1994), *cert. denied sub. nom., Pan American Airways, Inc. v. Pagnucco*, 115 S. Ct. 934 (1995); *Bowden v. Korean Air Lines*, 814 F. Supp. 592, 598 (E.D. Mich. 1993), *rev'd sub. nom., Bickel; In re Inflight Explosion on TWA Aircraft Approaching Athens, Greece on Apr. 2. 1986, Ospina v. TWA*, 778 F. Supp. 625, 637 (E.D.N.Y. 1991), *rev'd on other grds*, 975 F.2d 35 (2d Cir. 1992), *cert. denied*, 507 U.S. 1051 (1993).

For many Warsaw flights, DOHSA may be the applicable wrongful death statute. Given the increase in international flights to and from the United States by foreign air carriers, many of them transversing either the Atlantic or Pacific Oceans, the potential for application of § 764 is greatly magnified. Since there is a dearth of cases at the

appellate level, clarification by this Court could prevent contentious, lengthy, and expensive future litigation.

IV.

CERTIORARI SHOULD BE GRANTED TO BAR KAL'S BELATED APPEAL BY THE DOCTRINE OF ISSUE PRECLUSION

KAL appealed the within actions to the Ninth Circuit at the same time appealing verdicts arising from the Flight 007 catastrophe to the Sixth Circuit (*see, Bickel*) and the District of Columbia Circuit. (*see, Forman*). When this Court granted certiorari in *Zicherman,* each Circuit stayed proceedings until the Court entered its decision, at which time supplemental briefings were permitted.

KAL failed to raise the issue of the legal availability of a survival action claim for predeath pain and suffering in its briefs in any of the Circuits. The District of Columbia Circuit refused to address the issue, treating it as waived. *Forman,* 84 F.3d at 448. In an Amended Order, the Sixth Circuit declined to address the issue, also on the grounds that it had not been raised in the opening briefs and because *Zicherman* had not changed settled law. *Bickel,* 83 F.3d at *4.

Petitioner is in an identical posture as were the estate representatives in *Forman* and *Bickel.* Fairness dictates that she be treated equally by barring KAL from raising the issue under the doctrine of issue preclusion. Restatement (Second) Judgments, § 27.

V.

NUMEROUS CASES ARISING OUT OF AIR DISASTERS AWAIT A DEFINITIVE RULING ON RECOVERABLE DAMAGES IN SIMILAR CIRCUMSTANCES

There are currently 25 pending cases in the District and Circuit Courts arising from the KAL catastrophe yet these 16 years after its occurrence. Of those, four are pending in the District of Columbia Circuit on interlocutory appeal pursuant to 28 U.S.C. § 1292(a) addressing exactly the same issues presented in this Petition for Certiorari. Unless this Court grants the writ, the risk of inconsistent treatment of similarly situated plaintiffs is great.

Moreover, it should be noted that it may be argued that DOHSA and general maritime law apply to claims arising from the TWA Flight 800 catastrophe that resulted in the deaths of all 230 on board off the coast of New York on July 17, 1996. The existence and breadth of a general maritime law survival action will undoubtedly be raised in those cases. The sheer numbers of cases which the Court's decision would affect indicates the importance of the issues. These cases also await definitive guidance from the Court on the parameters of recovery under general maritime law.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted in all respects.

Dated: October 17, 1996

Respectfully submitted,

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FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KIMBERLY S. SAAVEDRA; THE ESTATE of MASAKAZU YAMAGUCHI; MAKIKO YAMAGUCHI; CHISATO YAMAGUCHI, et al., Plaintiffs-Appellees/ Cross-Appellants, v. KOREAN AIR LINES COMPANY, LTD. Defendant-Appellant/ Cross-Appellee.	Nos. 94-55018 94-55060 94-55161 DC NO. CV-84-09324-IH(JRx)

Appeals from the United States District Court
for the Central District of California
Irving Hill, District Judge, Presiding

KIMBERLY S. SAAVEDRA, as Special Administratrix of the Estate of MAKOTO OKAI, deceased, and as Personal Representative of TORU OKAI and HITOKO OKAI, Plaintiff-Appellant/ Cross-Appellee, v. KOREAN AIR LINES COMPANY, LTD. Defendant-Appellee/ Cross-Appellant.	Nos. 94-55495 94-55496 CV-84-09329-AWT OPINION

Appeals from the United States District Court
for the Central District of California
A. Wallace Tashima, District Judge, Presiding

Argued and Submitted
April 8, 1996 – Pasadena, California

Filed August 2, 1996

Before: Mary M. Schroeder and Edward Leavy, Circuit Judges, and James T. Trimble, Jr.,* District Judge.

Opinion by Judge Schroeder

SUMMARY

Torts/Admiralty and Marine/Aviation

The court of appeals vacated in part a district court order and affirmed in part. The court held that in a damages action arising out of the downing of a Korean Air Lines flight, any claims under American law for nonpecuniary damages, including compensation for the grief of the survivors and the pre-death pain and suffering of the victims, were effectively foreclosed by Supreme Court reasoning.

In 1983, missiles shot down one of appellant Korean Air Lines Company, Ltd.'s (KAL's) flights over the Sea of Japan. KAL's liability to all of the passengers on the flight was established in a single trial conducted in the District Court for the District of Columbia. The jury found that

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* Honorable James T. Trimble, Jr., United States District Judge for the Western District of Louisiana, sitting by designation.

KAL's "willful misconduct" caused the passengers' death, and the court of appeals affirmed that finding.

Appellee Kimberly Saavedra is the personal representative for the estates of three crash victims, Makoto and Yoko Okai and Masakazu Yamaguchi. Saavedra sued KAL in the District Court for the Central District of California, claiming a wide array of damages. Judge Irving Hill issued pretrial rulings and went on to preside over the jury trial of the Yamaguchi action. Judge A. Wallace Tashima presided over the jury trial of the Okai actions. In all of the cases, Saavedra proceeded under the Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention) and the Death on the High Seas Act (DOHSA). Under an order issued by Judge Hill, damages for loss of society were disallowed. Judge Tashima did not enter judgment on a jury finding of loss of society damages. The Okai and Yamaguchi juries awarded verdicts on other damages, including survivor's grief, pre-death pain and suffering of passengers, and loss of support. Both judges awarded prejudgment interest to Saavedra at the rate of the 52-week Treasury Bill (T-Bill) as of the last T-Bill auction prior to the judgment.

In both the Okai and Yamaguchi actions, the parties filed appeals and cross-appeals. In a related Supreme Court case, *Zicherman v. Korean Air Lines Co., Ltd.*, 116 S.Ct. 629 (1996), the Court invalidated an award for loss of society, holding that DOHSA does not authorize non-pecuniary damages.

[1] The Court's reasoning in *Zicherman*, although directly dealing only with a claim for loss of society,

effectively foreclosed any claims under American law for nonpecuniary damages, including compensation for the grief of the survivors and the pre-death pain and suffering of the victims.

[2] Like the plaintiffs in *Zicherman*, Saavedra claimed loss of society damages directly under the Warsaw Convention. [3] In *Zicherman*, the Court rejected the district court's theory that damages were recoverable directly under the Warsaw Convention, determining that courts are to determine what harm is "legally cognizable" only by referring to domestic law. [4] The Court then rejected the court of appeals' holding that general maritime law was the proper domestic law to consider. The Court reasoned that federal courts are authorized only "to apply the law that would govern in the absence of the Warsaw Convention," and in cases of wrongful death on the high seas, that law is DOHSA. The Court concluded that because DOHSA permits only pecuniary damages, loss of society damages are unavailable. [5] The rule in *Zicherman* had to be given retroactive effect in this case, which was pending when *Zicherman* was decided. Therefore, the district court judgments, insofar as they denied damages for loss of society, had to be affirmed.

[6] The district court allowed the jury to award damages in each case for survivor's grief on the ground that such damages were available directly under the Warsaw Convention. In light of *Zicherman*, however, the district court's theory was no longer tenable. The Court explained that no cause of action directly under the Warsaw Convention existed; the Convention merely provides "pass through" provisions that allow courts to use only domestic causes of action. Saavedra was limited to the

remedies provided in DOHSA. DOHSA creates only a cause of action for pecuniary damages suffered by the estate, and survivor's grief is a nonpecuniary damage. [7] Although Saavedra contended that a DOHSA section entitled "Rights of action given by laws of foreign countries" allowed recovery for damages available under Korean law, [8] she failed to preserve the theory in the district court. No evidence of Korean law was adduced at trial, and the question of survivor's grief damages under a Korean law theory was not put to the jury.

[9] Just as survivor's grief and loss of society damages were unavailable directly under the Convention, the same was true for pain and suffering. The Convention does not create a substantive cause of action. Pain and suffering is nonpecuniary, and DOHSA allows recovery only for pecuniary harm. [10] Saavedra never advanced a Korean law theory in support of pre-death pain and suffering damages to the district court. [11] Saavedra contended that a decedent's estate could bring a survival claim for pre-death pain and suffering under general maritime law, even though that cause of action was unavailable under DOHSA. Although the Court previously held that KOHSA may be supplemented by general maritime law [12] and the Ninth Circuit previously held that DOHSA may be supplemented with a survival action under general maritime law, [13] several subsequent Court decisions, culminating with *Zicherman*, precluded such relief. [14] Because DOHSA does not allow recovery for nonpecuniary damages, Congress' remedy could not be "supplemented" to allow a general maritime survival action for nonpecuniary damages, including the pre-death pain and suffering claimed in this case.

[15] Substantial evidence supported the jury's award of loss of support damages to the Okais' parents.

[16] In regard to prejudgment interest, Saavedar argued for a T-Bill rate just before the time of injury, while KAL argued for the T-Bill rate just before the time of judgment. Presented with those choices, the district court did not abuse its discretion.

COUNSEL

Juanita M. Madole, Speiser, Krause, Madole & Cook, Irvine, California, for the plaintiffs-appellees-cross-appellants.

Andrew J. Harakas, Tompkins, Harakas, Elsasser & Tompkins, White Plains, New York, for the defendant-appellant-cross-appellee.

OPINION

SCHROEDER, Circuit Judge:

These two sets of appeals and cross-appeals arise out of the Korean Air Lines ("KAL") disaster of September 1, 1983, when missiles fired from Soviet military aircraft shot down KAL Flight KE007 over the Sea of Japan. The plaintiff, Kimberly Saavedra, is the personal representative for the estates of three crash victims: Makoto and Yoko Okai, who were husband and wife, and Masakazu Yamaguchi. Saavedra filed these actions against KAL in the District Court for the Central District of California, claiming a wide array of damages.

When Saavedra filed suit, KAL's liability to all of the passengers on flight KE007 had already been established in a single trial, conducted in the District Court for the District of Columbia. *See In re Korean Air Lines Disaster of Sept. 1, 1983,* 575 F.Supp. 342, 343 (J.P.M.L. 1983)(per curiam). That trial followed from an order of the Judicial Panel on Multidistrict Litigation, which transferred all of the federal cases relating to the KEOO7 disaster to D.C. for resolution of the common issues. The jury in the consolidated trial found that KAL's "willful misconduct" had caused the death of the passengers, and awarded punitive damages. The Court of Appeals for the District of Columbia then vacated the award of punitive damages, but affirmed the finding of willful misconduct. *See In re Korean Air Lines Disaster of Sept. 1, 1983,* 932 F.2d 1475 (D.C. Cir.), *cert. denied,* 502 U.S. 994 (1991). Once the common liability issues were resolved, victims and their surviving relatives pursued actions for compensatory damages in various jurisdictions.

The cases before us were originally assigned to Judge Irving Hill of the Central District of California, who issued pretrial rulings and who went on to preside over the jury trial of the Yamaguchi action. Judge A. Wallace Tashima presided over the jury trial of the Okai actions. In all of the cases, Saavedra proceeded under the Convention for the Unification of Certain Rules Relating to International Transportation by Air, *done* at Warsaw, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, *reprinted in* 49 U.S.C.App. § 1502 note ("Warsaw Convention") and the Death on the High Seas Act, §§ 1 *et seq.*, 46 App.U.S.C.A. §§ 761 *et seq.* ("DOHSA"). Because the D.C. Circuit had upheld the jury's finding of willful misconduct, the $75,000 cap on

damages, contained in Article 25 of the Warsaw Convention, was lifted.

In a pretrial ruling that governed all of Saavedra's actions, Judge Hill specified the types of damages that were recoverable under DOHSA and the Warsaw Convention. Under Judge Hill's order, damages for loss of society were disallowed. Judge Tashima did submit instructions to the jury on the issue of loss of society, but in deference to Judge Hill's earlier ruling, did not enter judgment on the jury's finding of $300,000 loss of society damages. The Okai and Yamaguchi juries awarded the following verdicts on the other, permissible damages:

Kind of Damages	*Okai*	*Yamaguchi*
Loss of Support	$200,000	$1,813,391
Loss of Past and Future Services & Inheritance	$0	$115,140
Mental Anguish & Grief of Survivors	$150,000	$526,000
Funeral & Memorial Expenses	$0	$16,500
Pre-death Pain & Suffering of Passenger(s)	$1,500,000	$100,000
*Loss of Society	$300,000	—

*Not actually entered.

Both judges awarded prejudgment interest to Saavedra at the rate of the 52-week Treasury Bill ("T-Bill") as of the last T-Bill auction prior to the judgment.

In both the Okai and Yamaguchi actions, the parties have filed appeals and cross-appeals. Saavedra seeks loss of society damages and a higher award of prejudgment interest, while KAL challenges the amount of damages awarded. Many of the issues raised before this court were resolved for the first time in a recent, related Supreme Court case, *Zicherman v. Korean Air Lines Co., Ltd.*, 116 S.Ct. 629 (1996), an action for damages brought in the Southern District of New York on behalf of another KE007 crash victim. The Supreme Court in *Zicherman* invalidated an award for loss of society, holding that the DOHSA does not authorize nonpecuniary damages. *Id.* at 637. In light of *Zicherman*, we asked for supplemental briefing.

The parties now agree that the district courts' judgments correctly denied Saavedra any recovery for loss of society, and Saavedra's appeals in the Okai cases and cross-appeals in the Yamaguchi case are abandoned to the extent they sought such damages.

KAL further contends that the other district court awards of nonpecuniary damages, which include damages for survivor's grief and the pre-death pain and suffering of the decedents, are invalid in light of *Zicherman*. In the alternative, KAL challenges the sufficiency of the evidence supporting the award of pre-death pain and suffering, as well as the amount of those damages in the Okai cases. Saavedra defends these damages, arguing that they are supported by Korean law and thus are

redressable under DOHSA § 4, 46 U.S.C. § 764 ("rights of actions given by laws of foreign countries"), even if nonpecuniary damages are not otherwise available under DOHSA after *Zicherman*. Saavedra also argues that predeath pain and suffering damages are available as part of a general maritime survival action. Accordingly, we must first determine the effect of the *Zicherman* decision on the district courts' awards of nonpecuniary damages in these cases.

We also must consider the other damage issues. The first is KAL's sufficiency of the evidence challenge to the loss of support damages in the Okai cases. The other is Saavedra's contention that the district court abused its discretion in awarding prejudgment interest at the 52-week T-Bill rate in effect as of the last T-Bill auction prior to judgment, rather than at the higher rate in effect at the last T-Bill auction prior to the KE007 disaster.

[1] We hold that the Supreme Court's reasoning in *Zicherman*, although directly dealing only with a claim for loss of society, effectively forecloses any claims under American law for nonpecuniary damages, including compensation for the grief of the survivors, and the pre-death pain and suffering of the victims. We do not reach the question of whether claims for damages might also be made under foreign law pursuant to § 4 of DOHSA, 46 U.S.C. § 764, because Saavedra elected to proceed directly under the Warsaw Convention on the theory that the Convention authorizes claims broader than those allowed under DOHSA. Saavedra neither proffered evidence of Korean law at trial nor sought to have the jury instructed on Korean law.

We hold that Saavedra adduced sufficient evidence to support the award of loss of support in the Okai case. Finally, we hold that, given the alternatives presented to the district court, it did not abuse its discretion in awarding prejudgment interest at the 52-week T-Bill rate as of the last T-Bill auction prior to judgment.

THE ZICHERMAN LITIGATION

[2] The parties agree that the Supreme Court's decision in *Zicherman* forecloses Saavedra's claims for loss of society damages in both cases. Saavedra, like the plaintiffs in *Zicherman*, claimed loss of society damages directly under the Warsaw Convention. The parties disagree, however, on whether *Zicherman* forecloses other claims. To help resolve the disagreement over the proper interpretation of the Supreme Court's opinion, we look to the history of the *Zicherman* litigation.

The district court in *Zicherman*, 807 F.Supp. 1073, 1086-89 (S.D.N.Y. 1992), permitted the jury to award loss of society damages, on the ground that such damages were recoverable directly under Article 17 of the Convention, which makes the carrier, here Korean Air Lines, liable for "damage sustained in the event of death or wound of a passenger . . . " 49 Stat. 3018. In the district court's view, "damage sustained" referred to "actual harm experienced," 807 F.Supp. at 1087 (quoting *In re Korean Air Lines Disaster*, 932 F.2d at 1485), so that when a passenger died, actual harm experienced would include "monetary or other loss to the survivors," such as loss of society damages. *Id.* The district court rejected the notion that DOHSA limits the recovery available directly under

the Convention, concluding that to the extent a conflict exists, the Convention, which is more recent, governs. *Id.*

On direct appeal, the Second Circuit agreed that loss of society damages are available under the Warsaw Convention, but not on the same ground as the district court. The Second Circuit explained that "damages under the convention should be determined 'by general maritime law.' " *Zicherman v. Korean Air Lines Co., Ltd.*, 43 F.3d 18, 21 (quoting *In re Air Disaster at Lockerbie Scotland on Dec. 21, 1988*, 37 F.3d 804, 828 (2nd Cir. 1994)). The Second Circuit then concluded that general maritime law allows recovery for loss of society. *Id.*

[3] The Supreme Court reversed. *Zicherman*, 116 S.Ct. 629. First, the Court rejected the district court's theory that damages are recoverable directly under the Warsaw Convention. The Court explained that "damage" in Article 17 refers to "legally cognizable harm," and that adjudicating courts are to determine what harm is legally cognizable only by referring to domestic law. 116 S.Ct. at 634. In *Zicherman*, the parties agreed that the governing domestic law was the United States'.

[4] The Court then rejected the Second Circuit's holding that general maritime law is the proper domestic law to consider. The Court explained that Article 17 is merely a pass through provision that does not permit federal courts "to develop a common law rule – under the cover of general admiralty law or otherwise – that will supersede the normal federal disposition." *Id.* at 636. Thus, federal courts are authorized only "to apply the law that would govern in the absence of the Warsaw Convention." *Id.* In cases of wrongful death on the high

seas, that law is DOHSA. *Id.* Since DOHSA permits only pecuniary damages, loss of society damages are unavailable. *Id.*; 46 U.S.C.App. § 762.

[5] Because the rule in *Zicherman* was applied to the parties in that case, we must give the rule retroactive effect in this case, which was pending when *Zicherman* was decided. *See James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 540, 111 S.Ct. 2439 (1991)(holding that "it is error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so"); *Melton v. Moore*, 964 F.2d 880 (9th Cir. 1992). The district court judgments, insofar as they deny damages for loss of society, must be affirmed.

SURVIVOR'S GRIEF

[6] The district court allowed the jury to award damages in each case for survivor's grief, on the ground that such damages are available directly under the Warsaw Convention. In light of *Zicherman*, the district court's theory is no longer tenable. 116 S.Ct. at 634. As the Supreme Court explained, no cause of action directly under the Warsaw Convention exists; the Convention merely provides "pass through" provisions, which allow the courts to use only domestic causes of action. *Id.* at 636. Saavedra is therefore limited to the remedies provided in DOHSA. *Id.* Because DOHSA creates only a cause of action for pecuniary damages suffered by the estate, and the survivor's grief is a nonpecuniary damage, we must hold that the district court erred in permitting Saavedra to proceed on that claim and in awarding judgment upon it.

[7] Saavedra alternatively argues on appeal that although DOHSA generally bars nonpecuniary damages, such damages are available under § 4 of DOHSA, which Saavedra contends allows recovery in this case for damages available under Korean law. Section 4, entitled "Rights of action given by laws of foreign countries" provides:

> Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.

46 U.S.C. § 764.

Defendants argue that § 4 is essentially a choice of law provision that does not permit a plaintiff to pick and choose among United States and foreign law. Several courts have so interpreted § 4. *See, e.g., Bergeron v. Koninklijke Luchtvaart Maatschappij, N.V.*, 188 F.Supp. 594 (S.D.N.Y.1960), *appeal dismissed*, 299 F.2d 78 (2d Cir. 1962); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 814 F.Supp. 592, 599 (E.D. Mich. 1992); *In re Air Crash Disaster Near Bombay, India on Jan. 1, 1978*, 531 F.Supp. 1175, 1185-86 (W.D.Wash. 1982). On the other hand, there are several district court cases permitting claims under foreign law in addition to claims brought under United States statutes. *See, e.g., Powers v. Cunard S.S. Co.*, 32 F.2d 720 (S.D.N.Y. 1925); *Noel v. Linea Aeropostal Venezolana*, 260

F.Supp. 1002 (S.D.N.Y. 1966); *Heath v. American Sail Training Association*, 644 F.Supp. 1459, 1467 (D.R.I. 1986).

[8] The Supreme Court's decision in *Zicherman* does not address this issue, for the parties in that case agreed that only United States law applied. 116 S.Ct. at 635. We also need not address the issue, as Saavedra failed to properly preserve it. Initially, Judge Hill, in his Order Declaring Applicable Law, held that survivor's grief damages were available pursuant to the Korean law theory that Saavedra now urges. Saavedra, however, had a change of heart and moved the district court to delete any reference to Korean law, and to hold instead that survivor's grief damages were available directly under the Warsaw Convention. Judge Hill granted Saavedra's motion. Thus, no evidence of Korean law was adduced at trial, and the question of survivor's grief damages under a Korean law theory was never put to the jury. Given these facts, we hold that Saavedra failed to preserve this theory in the district court, and it is hence unavailable to her on appeal. *See Moran v. Aetna Life Insurance Co.*, 872 F.2d 296, 300 (9th Cir. 1989)(plaintiff may not assert an alternate theory for defendant's liability for the first time on appeal).

PRE-DEATH PAIN AND SUFFERING

At trial Saavedra introduced evidence to establish that the KE007 victims survived for eleven to twelve minutes after the Soviet missile(s) hit the plane. Saavedra also provided dramatic expert opinions describing how the victims probably suffered, both mentally, because

they were cognizant of their impending deaths, and physically, because altitude decompression causes the gases trapped inside the body to try to escape.

[9] The district court held that Saavedra was "entitled to assert a survival claim for decedents' pre-death pain and suffering, based [directly] on Article 17 of the Warsaw Convention." But, just as survivor's grief and loss of society damages are unavailable directly under the Convention, the same is true for pain and suffering. The Convention simply does not create a substantive cause of action, and the contrary view, adopted by the District Court in *Zicherman* as well as the district court here, has been squarely rejected. 116 S.Ct. at 631. Saavedra must turn to DOHSA, but that statute simply will not brook pain and suffering relief. First, pain and suffering is nonpecuniary and DOHSA allows recovery only for pecuniary harm. 46 U.S.C. § 762. Second, DOHSA authorizes a wrongful death action on behalf of the decedents' immediate family and dependent relatives, 46 U.S.C. § 761; whereas pre-death pain and suffering damages are generally brought as part of a survival action on behalf of the decedent. *See generally, Evich v. Morris*, 819 F.2d 256, 258 (9th Cir.)(*"Evich II"*) (pre-death pain and suffering generally recoverable as part of survival action), *cert. denied*, 484 U.S. 914 (1987), *implied overruling in part recognized by, Davis v. Bender Shipbuilding and Repair Co., Inc.*, 27 F.3d 426, 430 (9th Cir. 1994).

[10] Saavedra, recognizing that these damages are not ordinarily available under the Warsaw Convention and DOHSA, attempts to defend the award on two grounds. The first is the same as that asserted with respect to survivor's grief, namely that a claim for such

damages is recognized under Korean law. The record indicates, however, that Saavedra never advanced this Korean law theory in support of pre-death pain and suffering damages to the district court. Further, Saavedra never adduced evidence at trial of what these damages would be under Korean law, and never put the question to the jury. Because the record with respect to pre-death pain and suffering is materially the same as that with respect to survivor's grief, Saavedra's Korean law argument must be rejected for the same reasons. *Moran*, 872 F.2d at 300.

[11] Second, Saavedra contends that a decedent's estate can bring a survival claim for pre-death pain and suffering under general maritime law, even though that cause of action is unavailable under DOHSA. Saavedra points out that in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 402, 90 S.Ct. 1772 (1970), the Supreme Court held that DOHSA may be supplemented by general maritime law. "The Death on the High Seas Act was not intended to preclude the availability of a remedy for wrongful death under general maritime law in situations not covered by the Act." *Id.* at 1775. *Moragne* arose out of the death of a longshoreman on a ship. The Court allowed the longshoreman's widow to bring a general maritime wrongful death action, asserting the unseaworthiness of the vessel, despite the fact that DOHSA did not cover the decedent's particular situation.

[12] This court held, following *Moragne*, that DOHSA may be supplemented with a survival action under general maritime law, *Evich v. Connelly*, 759 F.2d 1432, 1434 (9th Cir. 1985)("*Evich I*"), and we noted that

such survival actions have generally allowed compensation for pre-death pain and suffering. Evich II, 819 F.2d at 256. We also said that the decedent's future earnings were compensable in such an action. *Id.* Saavedra relies on these cases.

[13] If *Evich I* and *Evich II* were the only relevant precedents, Saavedra's argument for pre-death pain and suffering damages would be persuasive; however, several subsequent Supreme Court decisions, culminating with *Zicherman*, undoubtedly preclude such relief. The first is *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010 (1978), where the Court held that because DOHSA bars nonpecuniary damages, DOHSA may not be supplemented with a general maritime wrongful death action for nonpecuniary damages, specifically loss of society damages. The Court explained that "when [Congress] does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless." *Id.* at 625, 98 S.Ct. at 2015. The Court applied similar logic in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 34-36, 111 S.Ct. 317, 326-328 (1990), holding that since the survival action created by the Jones Act bars recovery for loss of future earnings, a supplemental survival action under general maritime law, allowing recovery for loss of future earnings, is impermissible. Miles therefore overruled *Evich II*, insofar as *Evich II* allowed a general maritime survival action for loss of future earnings. *Davis*, 27 F.3d at 430. Finally, in *Zicherman*, the Court rejected the view, adopted by the Second Circuit, that general maritime law ordinarily governs domestic actions brought under the Warsaw Convention, stressing that the Warsaw Convention does not

"empower [the courts] to develop some common law rule – under general admiralty law or otherwise – that will supersede the normal federal disposition."

[14] We are therefore compelled to hold that because DOHSA does not allow recovery for nonpecuniary damages, we cannot 'supplement' Congress' remedy, allowing a general maritime survival action for nonpecuniary damages, including the pre-death pain and suffering claimed here. Saavedra notes that the Court in *Zicherman* specifically left open the question of whether an award of pain and suffering damages was permissible; however, the Court declined to address pain and suffering only because that award was not challenged on petition for certiorari. 116 S.Ct. at 636 n. 4. The Supreme Court, in holding that DOHSA cannot be supplemented by general maritime law in order to obtain loss of society damages, gave no indication that there was any material difference between loss of society damages and any other nonpecuniary damages, all of which DOHSA expressly disallows. Nor can we find any basis for such a distinction. The Sixth Circuit addressed this very issue in *Bickel v. Korean Air Lines Co., Ltd.*, 83 F.3d 127, 132 (6th Cir. 1996), and came to the same conclusion:

> As to the recoverability of survivor's grief damages under DOHSA, we note that the Supreme Court did not directly address this issue. We cannot, however, perceive any distinction of which the *Zicherman* Court would have approved that would permit us to conclude that the recovery of one sort of non-pecuniary damages, such as loss of society, is precluded by DOHSA, whereas other sorts of non-pecuniary damages, such as survivor's grief, are not.

We agree with the Sixth Circuit and decline Saavedra's invitation to circumvent Congressional wisdom by allowing damages that DOHSA precludes.

LOSS OF SUPPORT

In the Okai appeal, KAL contends that the district court erred by failing to set aside the loss of support damages awarded to the Okais' parents. This court will not disturb a jury verdict supported by substantial evidence. *Davis v. Mason County*, 927 F.2d 1473, 1486 (9th Cir.), *cert. denied*, 502 U.S. 899 (1991).

KAL first contends that Saavedra adduced no evidence that the Okais' parents had a reasonable expectation of future financial support. *See Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1350 (9th Cir. 1987)("recovery for loss of support requires some showing of dependence on the deceased or an expectation of support"), *cert. denied*, 493 U.S. 871 (1989). This contention lacks merit. Makoto Okai's father and Yoko Okai's mother both testified that as they aged, they would expect support from their children. Moreover, Saavedra solicited testimony from a cultural anthropologist, who agreed that in Japanese culture, the Okais' parents could reasonably expect support from the Okais.

[15] KAL also takes issue with the manner in which Saavedra's expert economist calculated the Okais' future earnings. Specifically, the economist calculated Makoto Okai's future earnings from statistics for college graduates, since no statistics for Makoto Okai's actual profession – jazz musician in Japan – were available. The economist also admitted that he did not take the Okais'

personal consumption into account when calculating future earnings. These perceived weaknesses do not render the economist's testimony meaningless. The arguments KAL now makes were presented to the jury, and we are not permitted to weigh the evidence again, or to substitute our own judgment for the jury's. *Oviatt By and Through Waugh v. Pearce*, 954 F.2d 1470, 1473 (9th Cir. 1992). On this record, substantial evidence supports the jury award.

INTEREST

Saavedra argues that the district court erred by setting prejudgment interest at the 52-week T-Bill rate in effect just before judgment, rather than at the higher rate available right before the KE007 disaster. We review a district court's decision to assess prejudgment interest rates for abuse of discretion. *Vance v. American Hawaii Cruises, Inc.*, 789 F.2d 790 (9th Cir. 1986).

[16] Saavedra contends, correctly, that prejudgment interest is a compensatory measure. *Western Pac. Fisheries, Inc. v. S.S. President Grant*, 730 F.2d 1280, 1288-89 (9th Cir. 1984). Saavedra is incorrect, however, that the district court was required to choose the higher interest rate at the date of the crash in order to achieve adequate compensation. The most accurate way to fully compensate a plaintiff would be to award prejudgment interest from the date of injury, but at a fluctuating rate. *See generally, MHC, Inc. v. Oregon Dep't of Revenue*, 66 F.3d 1082, 1090-91, n. 10, n. 11 (applying fluctuating T-Bill rate, calculated daily from date obligation was due). None of the parties presented this option to the district court.

Instead, Saavedra argued for T-Bill rate just before the time of injury, while KAL argued for the T-Bill rate just before the time of judgment. We find that the district court, presented with these choices, did not abuse its discretion.

Indeed, the district court's decision is consistent with 28 U.S.C. § 1961(a), which states that post-judgment interest should be set at the T-Bill rate "settled immediately prior to the date of judgment." Although this section governs post-judgment interest, this court has applied its presumption in favor of using T-Bill rates in the context of prejudgment interest. *See, e.g., In re Nucorp Energy, Inc.*, 902 F.2d 729, 734 (9th Cir. 1990). As we have previously used § 1961(a) as a yardstick for prejudgment interest, we would be remiss to hold that the district court abused its discretion in following the dictates of § 1961(a).

CONCLUSION

We therefore VACATE the award of damages for survivor's grief and pre-death pain and suffering of the passengers. We AFFIRM the award of loss of support damages, the district court's refusal to grant loss of society damages, and the district court's order awarding prejudgment interest at the T-Bill rate just prior to judgment.

NOT FOR PUBLICATION
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KIMBERLY S. SAAVEDRA; The Estate of MASAKAZU YAMAGUCHI; MAKIKO YAMAGUCHI; CHISATO YAMAGUCHI, et al., Plaintiffs-Appellees/ Cross-Appellants, v. KOREAN AIR LINES COMPANY, LTD. Defendant-Appellant/ Cross-Appellee.	Nos. 94-55018 94-55060 94-55161 DC No. CV-84-09324-IH (JRx) (Central California)
KIMBERLY S. SAAVEDRA, as Special Administratrix of the Estate of MAKOTO OKAI, deceased, and as Personal Representative of TORU OKAI and HITOKO OKAI, Plaintiff-Appellant/ Cross-Appellee, v. KOREAN AIR LINES COMPANY, LTD. Defendant-Appellee/ Cross-Appellant.	Nos. 94-55495 94-55496 DC No. CV-84-09329-AWT ORDER (Filed Sept. 9, 1996)

BEFORE: SCHROEDER and LEAVY, Circuit Judges, and TRIMBLE,* District Judge.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* Honorable James T. Trimble, Jr., United States District Judge for the Western District of Louisiana, sitting by designation.

No. 96-623

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

KIMBERLY S. SAAVEDRA, as Special Administratrix of The Estates of Masakazu Yamaguchi, et al.,

Petitioners,

—v.—

KOREAN AIR LINES CO., LTD.,

Respondent.

KIMBERLY S. SAAVEDRA, as Special Administratrix of The Estates of Makoto Okai and Yooko Okai, et al.,

Petitioners,

—v.—

KOREAN AIR LINES CO., LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether the court below properly applied, in pending but undecided appeals, the intervening decision of the Court in *Zicherman v. Korean Air Lines*, 116 S. Ct. 629 (1996), to disallow an award of nonpecuniary pre-death pain and suffering damages?

2. Whether, in light of *Zicherman*, the pecuniary damage standard of the Death on the High Seas Act ("DOHSA"), 46 U.S.C. App. § 761 *et seq.*, may be supplemented with *any* nonpecuniary damages, on the basis of the Warsaw Convention, general maritime law or state law?

These questions, in an inverse context, are presented for review in the Petition for a Writ of Certiorari filed by Respondent in *Korean Air Lines v. Forman*, No. 96-530 (U.S., docketed Oct. 3, 1996).

RULE 29.6 LISTING

Respondent KOREAN AIR LINES CO., LTD. ("KAL") is a Korean corporation engaged in the business of international transportation by air of passengers, baggage and cargo. KAL is a member of The Hanjin Group of Korea, which comprises companies under common management direction. KAL's investments in securities and/or affiliated companies consist of the following:

Air Cargo Terminal Co., Ltd.
Air Korea Co., Ltd.
Daehan Oil Pipeline Corporation
Government Bonds
Hana Bank
Hanil Bank
Hanjin Construction Co., Ltd.
Hanjin Data Communication
Hanjin Heavy Industry Co., Ltd.
Hanjin International Corp.
Hanjin Int'l Japan Co., Ltd.
Hanjin Investment Securities Co., Ltd.
Hanjin Shipping Co., Ltd.
Hyundai Oil Refinery Co., Ltd.
Korea Air Terminal Service Co., Ltd.
Korea Freight Transportation Co., Ltd.
Korea Investment Corporation
Korean French Banking Corporation
Korea Technology Development Co., Ltd.
Kyungki Bank, Ltd.
Peace Bank of Korea
Terminal One Management Inc.
The Company Fund
The Korea Economic Daily

TABLE OF CONTENTS

PAGE

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW i

RULE 29.6 LISTING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATUTORY AND TREATY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. The Rulings of the District Court 2

B. The Appeals and the Intervening Supreme Court Decision in *Zicherman v. Korean Air Lines* 3

C. The Decision of the Court Below 6

ARGUMENT 7

I. THE PETITION SHOULD BE GRANTED LIMITED TO THE QUESTIONS AS RESTATED HEREIN 7

II. THE OTHER QUESTIONS PRESENTED DO NOT WARRANT REVIEW 11

A. Petitioners Elected to Proceed Under United States Law Alone 11

PAGE

B. The Court Below Properly Addressed and Decided the Effect of the Intervening *Zicherman* Decision on the Pending but Undecided Appeals 13

CONCLUSION 15

APPENDIX

TABLE OF AUTHORITIES

Cases:

PAGE

Azzopardi v. Ocean Drilling & Exploration Co., 742 F.2d 890 (5th Cir. 1984) 4n

Barbe v. Drummond, 507 F.2d 794 (1st Cir. 1974) 4n

Beirn v. Korean Air Lines, Nos. 83-4624, 83-4626, memo. op. (E.D.N.Y. Aug. 28, 1996).....9n, 10, 12, 13

Bergeron v. Koninklijke Luchtvaart Maatschappij, 188 F. Supp. 594 (S.D.N.Y. 1960)..... 13

Bickel v. Korean Air Lines, 83 F.3d 127 (6th Cir. 1996) ("*Bickel I*"), *amended on reh'g*, 96 F.3d 151 (6th Cir. 1996) ("*Bickel II*") 7-10

Bowden v. Korean Air Lines, 814 F. Supp. 592 (E.D. Mich. 1993), *rev'd sub nom. Bickel v. Korean Air Lines*, 83 F.3d 127 (6th Cir.), *amended on reh'g*, 96 F.3d 151 (6th Cir. 1996).....4n, 8n

Dugas v. Nat'l Aircraft Corp., 438 F.2d 1386 (3d Cir. 1971) 4n

Evich v. Connelly, 759 F.2d 1432 (9th Cir. 1985), *cert. denied*, 484 U.S. 914 (1987)..... 9n

Forman v. Korean Air Lines, 84 F.3d 446 (D.C. Cir. 1996), *petition for cert. filed sub nom. Korean Air Lines v. Forman*, No. 96-530 (U.S., docketed Oct. 3, 1996) 7-10

Forman v. Korean Air Lines, No. 83-3578, memo. op. (D.D.C. June 6, 1995)..... 8n

Harper v. Virginia Dept. of Taxation, 509 U.S. 86 (1993) 14

PAGE

Heath v. American Sail Training Ass'n, 644 F. Supp. 1459 (D.R.I. 1986) 13

In re Air Crash Disaster Near Bombay, India on Jan. 1, 1978, 531 F. Supp. 1175 (W.D. Wash. 1982) .. 13

In re Air Crash Disaster Near Honolulu, Hawaii on Feb. 24, 1989, 783 F. Supp. 1261 (N.D. Cal. 1992) 4n

In re Inflight Explosion on TWA Aircraft Approaching Athens, Greece on Apr. 2, 1986, 778 F. Supp. 625 (E.D.N.Y. 1991), *rev'd on other grounds*, 975 F.2d 35 (2d Cir. 1992), *cert. denied*, 507 U.S. 1051 (1993) 4n

In re Korean Air Lines Disaster of Sept. 1, 1983, MDL No. 565, Nos. 83-3587 *et al.*, memo. op. (D.D.C. Apr. 8, 1993) 8n

In re Korean Air Lines Disaster of Sept. 1, 1983, 935 F. Supp. 10 (D.D.C. 1996), *interlocutory appeal granted*, No. 96-8013 (D.C. Cir. Aug. 15, 1996) 10, 12

James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991) 14

Korean Air Lines v. Forman, No. 96-530 (U.S., docketed Oct. 3, 1996) ..... i, 8n, 9, 15

Noel v. Airponents, Inc., 169 F. Supp. 348 (D.N.J. 1958) 13

Noel v. Linea Aeropostal Venezolana, 260 F. Supp. 1002 (S.D.N.Y. 1966) 13

Park v. Korean Air Lines, 24 Av. Cas. (CCH) 17,253, 1992 WL 331902 (S.D.N.Y. 1992) 13

PAGE

Pescatore v. Pan Am World Airways, 97 F.3d 1 (2d Cir. 1996) 15

Powers v. Cunard S.S. Co., 32 F.2d 720 (2d Cir. 1925) 13

Rivers v. Roadway Express, 114 S. Ct. 1510 (1994) ... 14

Saavedra v. Korean Air Lines, 93 F.3d 547 (9th Cir. 1996) ..... *passim*

Saavedra v. Korean Air Lines, Nos. 84-9324 *et al.*, Order Declaring Applicable Law (C.D. Cal. Oct. 19, 1992) 1, 3

Saavedra v. Korean Air Lines, Nos. 84-9324 *et al.*, Order Amending Order of October 19, 1992 Denominated "Order Declaring Applicable Law" (C.D. Cal. July 16, 1993) 2, 3

U.S. Nat'l Bank of Oregon v. Independent Ins. Agents of America, 508 U.S. 439 (1993) 14

Zicherman v. Korean Air Lines, 116 S. Ct. 629 (1996) ..... *passim*

Treaties and Statutes:

Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (reprinted in note following 49 U.S.C. § 40105) *passim*

Death on the High Seas Act ("DOHSA"), 46 U.S.C. App. § 761 *et seq.* ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-623

KIMBERLY S. SAAVEDRA, as Special Administratrix
of The Estates of Masakazu Yamaguchi, et al.,
Petitioners,

—v.—

KOREAN AIR LINES CO., LTD.,
Respondent.

KIMBERLY S. SAAVEDRA, as Special Administratrix
of The Estates of Makoto Okai and Yooko Okai, et al.,
Petitioners,

—v.—

KOREAN AIR LINES CO., LTD.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The Petition for Writ of Certiorari ("Petition") does not make reference to the following relevant Orders of the district court below: *Saavedra v. Korean Air Lines*, Nos. 84-9324 *et al.*, Order Declaring Applicable Law (C.D. Cal. Oct. 19,

1992) and *Saavedra v. Korean Air Lines*, Nos. 84-9324 *et al.*, Order Amending Order of October 19, 1992 Denominated "Order Declaring Applicable Law" (C.D. Cal. July 16, 1993). These Orders are not officially reported but are reproduced in the Appendix hereto at RA 1 and 5, respectively. References preceded by "RA" refer to pages in the Appendix hereto. References preceded by "A" refer to pages in the Appendix to the Petition.

STATUTORY AND TREATY PROVISIONS INVOLVED

These actions are governed exclusively by the Death on the High Seas Act ("DOHSA"), 46 U.S.C. App. § 761 *et seq.* and the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934) (reprinted in note following 49 U.S.C. § 40105) ("Warsaw Convention"). The pertinent provisions are set forth at RA 12-13.

STATEMENT OF THE CASE

Respondent KOREAN AIR LINES CO., LTD. ("KAL") supplements the statement of the case in the Petition to set forth fully the disposition of the cases in the district court and in the Court of Appeals below.

A. The Rulings of the District Court

Prior to trial, KAL moved for a determination that DOHSA applies to the damage claims and prohibits the recovery of any nonpecuniary damages for loss of society, survivor's grief and pre-death pain and suffering of the deceased passengers. The district court[1] ruled that DOHSA did apply and properly

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[1] These cases originally were assigned to District Judge Irving Hill of the Central District of California, who issued pretrial rulings applicable to both cases and who presided over the jury trial of the *Yamaguchi* action. District Judge A. Wallace Tashima presided over the jury trial in the *Okai* actions.

concluded that nonpecuniary damages for loss of society were not recoverable. *Saavedra v. Korean Air Lines*, Nos. 84-9324 *et al.*, Order Declaring Applicable Law (C.D. Cal. Oct. 19, 1992) ("Order Declaring Applicable Law") (RA 1). The district court, however, adopting the argument of Petitioners, held that: (1) nonpecuniary survivor's grief damages were recoverable based on Korean law through § 764 of DOHSA, and (2) nonpecuniary pre-death pain and suffering damages were recoverable "based on Article 17 of the Warsaw Convention". Order Declaring Applicable Law at RA 2-3.

Nine months later, Petitioners moved the district court to delete any reference to Korean law as a basis for any damage recovery. *See Saavedra v. Korean Air Lines*, Nos. 84-9324 *et al.*, Order Amending Order of October 19, 1992 Denominated "Order Declaring Applicable Law" (C.D. Cal. July 16, 1993) ("Amending Order") (RA 5). Petitioners, in a reversal of position, argued that Korean law was inapplicable after all and that survivor's grief damages were recoverable solely on the basis of the Warsaw Convention. Amending Order at RA 6-7. The district court granted Petitioners' motion. Amending Order at RA 7.

Following separate damage trials, the jury in each case awarded pecuniary damages and nonpecuniary damages for survivor's grief and decedents' pre-death pain and suffering, in the amounts set forth in the Petition at 3. The district court in each case denied KAL's post-trial motions to set aside all nonpecuniary damage awards.

B. The Appeals and the Intervening Supreme Court Decision in *Zicherman v. Korean Air Lines*

KAL appealed the judgments entered in the district court, including the pre-trial and post-trial orders of the district court. In its initial appellate briefs, KAL argued that nonpecuniary damages for loss of society and survivor's grief

were not recoverable under DOHSA and that the awards for nonpecuniary pre-death pain and suffering damages were not supported by sufficient evidence. KAL did not argue in its initial briefs the antecedent question of whether nonpecuniary pre-death pain and suffering damages were recoverable as a matter of law because, unlike loss of society damages, *all* pre-*Zicherman* decisions uniformly had allowed the recovery of nonpecuniary pre-death pain and suffering damages on the basis of the Warsaw Convention[2], general maritime law and/or state law.[3] Such was the state of the law, absent a definitive ruling from the Court.

Petitioners argued on appeal that the recoverable damages are defined by the Warsaw Convention, federal common law and/or general maritime law, which Petitioners asserted allow for the recovery of all nonpecuniary damages awarded in the district court.

On January 16, 1996, while the appeals were pending in the court below and after briefing but before argument, the Court decided *Zicherman v. Korean Air Lines*, 116 S. Ct. 629 (1996). The Court in *Zicherman* rejected the notion that any type of damages are recoverable directly under Article 17 of the Warsaw Convention as "damage sustained." *Zicherman*, 116 S. Ct. at 632-636. The Court explained that "damage sustained" in Article 17 refers to "legally cognizable harm" and

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[2] *See, e.g., Bowden v. Korean Air Lines*, 814 F. Supp. 592, 598 (E.D. Mich. 1993), *rev'd sub nom. Bickel v. Korean Air Lines*, 83 F.3d 127, 132 (6th Cir.), *amended on reh'g*, 96 F.3d 151 (6th Cir. 1996); *In re Inflight Explosion on TWA Aircraft Approaching Athens, Greece on Apr. 2, 1986*, 778 F. Supp. 625, 637 (E.D.N.Y. 1991), *rev'd on other grounds*, 975 F.2d 35 (2d Cir. 1992), *cert. denied*, 507 U.S. 1051 (1993); *In re Air Crash Disaster Near Honolulu, Hawaii, on Feb. 24, 1989*, 783 F. Supp. 1261, 1264 (N.D. Cal. 1992).

[3] *See, e.g., Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890, 893 (5th Cir. 1984); *Barbe v. Drummond*, 507 F.2d 794, 799 (1st Cir. 1974); *Dugas v. Nat'l Aircraft Corp.*, 438 F.2d 1386, 1389 (3d Cir. 1971).

that courts are to determine "legally cognizable harm" *only* by reference to the applicable domestic law under the forum's choice-of-law rules, pursuant to Article 24 of the Convention. *Id.* In *Zicherman*, as in these cases, the applicable domestic law is DOHSA. *Id.* at 635-36.

The Court in *Zicherman* also rejected the rationale and holding of the Court of Appeals for the Second Circuit (from which the *Zicherman* case emanated) that general maritime/federal common law is the proper domestic law to consider. *Id.* The Court explained that Article 17 of the Convention is merely a "pass-through" provision that does not permit federal courts "to develop some common-law rule—under cover of general admiralty law or otherwise—that will supersede the normal federal disposition" absent the Convention. *Id.* at 636. Thus, federal courts are authorized only "to apply the law that would govern in absence of the Warsaw Convention." *Id.*

The applicable law in *Zicherman* was DOHSA, which permits recovery of pecuniary damages only. *Id.*; 46 U.S.C. App. § 762 (RA 13). The Court, therefore, concluded that nonpecuniary damages for loss of society (the only specific damage award involved in *Zicherman*) were unavailable. *Id.* The Court specifically noted that it did not consider "whether § 762 [of DOHSA] contradicts the District Court's allowance of pain and suffering damages," because the question was not before the Court. *Id.* at 636, n.4.

Following the Court's decision in *Zicherman*, KAL moved the court below for permission to submit a supplemental brief in each of the pending appeals to address the recoverability of nonpecuniary pre-death pain and suffering damages as a matter of law, in light of *Zicherman*. In response, the court below directed the parties to submit supplemental briefs addressing the significance of *Zicherman* on the pending appeals. *See Okai* Order (9th Cir. Mar. 6, 1996) (RA 10); *Yamaguchi* Order (9th Cir. Mar. 6, 1996) (RA 8). The effect of the *Zicherman*

decision then was fully briefed by the parties in their respective supplemental briefs and addressed at oral argument of the appeals.

C. The Decision of the Court Below

On August 2, 1996, the court below rendered its decision and held that: (1) *Zicherman* clearly foreclosed the recovery of nonpecuniary damages for loss of society and (2) the Court's reasoning in *Zicherman* "effectively forecloses any claims under American law for nonpecuniary damages, including compensation for the grief of the survivors, and the pre-death pain and suffering." *Saavedra v. Korean Air Lines*, 93 F.3d 547, 549-51 (9th Cir. 1996) (A 1a, 9a-10a).

The court below rejected Petitioners' argument in their supplemental brief that survivor's grief and pre-death pain and suffering damages were recoverable under Korean law pursuant to § 764 of DOHSA. 46 U.S.C. App. § 764 (RA 13). The court concluded that, under the facts and proceedings in the district court (*see* discussion *supra* at 3), Petitioners had "failed to preserve this theory in the district court, and it is hence unavailable to her on appeal." *Saavedra*, 93 F.3d at 552 (A 15a).

The court below also rejected Petitioners' argument that DOHSA can be supplemented with nonpecuniary damages under general maritime law. *Id.* at 553-54 (A 17a-18a). In light of *Zicherman*, the court concluded that it was:

> compelled to hold that because DOHSA does not allow recovery for nonpecuniary damages, we cannot 'supplement' Congress' remedy, allowing a general maritime survival action for nonpecuniary damages, including the pre-death pain and suffering claimed here.

Id. at 554 (A 19a).

ARGUMENT

I

THE PETITION SHOULD BE GRANTED LIMITED TO THE QUESTIONS AS RESTATED HEREIN

KAL agrees with Petitioners that the question of whether DOHSA may be supplemented with nonpecuniary pre-death pain and suffering damages is important and worthy of review. KAL also agrees that there is a conflict among the circuit courts on this question, but not only on the basis identified by Petitioners.

Petitioners suggest that a "conflict now exists among the circuit courts as to whether a general maritime law survival action for a decedent's pre-death pain and suffering" may exist in an action governed by DOHSA. Petition at 6. While a conflict does exist, Petitioners fail to identify the real conflict. The actual conflict that now exists is between the decision of the court below, which properly applied *Zicherman*, and the decisions of the Court of Appeals for the District of Columbia Circuit in *Forman v. Korean Air Lines*, 84 F.3d 446 (D.C. Cir. 1996) ("*Forman*"), *petition for cert. filed sub nom. Korean Air Lines v. Forman*, No. 96-530 (docket, Oct. 3, 1996), and the amended decision of the Court of Appeals for the Sixth Circuit in *Bickel v. Korean Air Lines*, 96 F.3d 151 (6th Cir. 1996) ("*Bickel II*"), *amending on reh'g*, 83 F.3d 127 (6th Cir. 1996) ("*Bickel I*"). In both cases, the court failed to properly apply *Zicherman* and as a result, upheld awards of nonpecuniary pre-death pain and suffering damages based solely on Article 17 of the Warsaw Convention.

The court below recognized that, in light of the intervening *Zicherman* decision, the district court's theory that nonpecuniary pre-death pain and suffering damages are recoverable directly under the Warsaw Convention no longer is tenable. *Saavedra*, 93 F.3d at 553 (A 16a). Thus, the court below

undertook an analysis of the applicable domestic law, DOHSA, and concluded, on the basis of *Zicherman*, that (1) DOHSA "will not brook pain and suffering relief" and (2) DOHSA cannot be supplemented with a "general maritime survival action for nonpecuniary damages, including pre-death pain and suffering" damages. *Id.* at 553-54 (A 16a-19a). Such is the clear teaching of the intervening *Zicherman* decision.

The district courts in *Forman*[4] and *Bickel*[5] similarly had held that nonpecuniary pre-death pain and suffering damages were available directly under the Convention. However, unlike the court below, the Courts of Appeals in *Forman* and *Bickel II* declined to address the argument that the intervening decision in *Zicherman* rendered invalid the legal basis for the award of nonpecuniary damages for pre-death pain and suffering and upheld the awards based solely on Article 17 of the Warsaw Convention. *Bickel II*, 96 F.3d at 153-54; *Forman*, 84 F.3d at 448-49. The court in *Forman* held that KAL waived the argument, because it was not raised in the opening brief. The court in *Bickel II*, which previously had found[6] *Zicherman* to create an "insuperable obstacle" to the recovery of such nonpecuniary damages, held on rehearing (2-1) that *Zicherman* "neither added to, nor made any changes in, the law regarding the availability of nonpecuniary damages under DOHSA." *Bickel II*, 96 F.3d at 153. KAL's petition for a writ of certiorari in *Forman* currently is pending before the Court.

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[4] *In re Korean Air Lines Disaster of Sept. 1, 1983*, MDL No. 565, Nos. 83-3587 *et al.*, memo. op. (D.D.C. Apr. 8, 1993) and *Forman v. Korean Air Lines*, No. 83-3587, memo. op. (D.D.C. June 6, 1995). These decisions are not officially reported but are reproduced in the Appendix at A 52a-55a and A 10a-32a to the Petition for a Writ of Certiorari in *Korean Air Lines v. Forman*, No. 96-530 (U.S., docketed Oct. 3, 1996).

[5] *Bowden*, 814 F. Supp. at 597-98.

[6] *See Bickel I*, 83 F.3d at 132.

Korean Air Lines v. Forman, No. 96-530 (U.S., docketed Oct. 3, 1996).

The real and direct conflict that exists is between the decision of the court below and the decisions in *Forman* and *Bickel II*: (1) all three appeals arise out of the KAL flight KE007 disaster; (2) the district courts in all three cases awarded pre-death pain and suffering damages solely on the basis of the Warsaw Convention; (3) all three appeals were pending when *Zicherman* was decided; (4) all three Courts of Appeals directed the parties to file briefs to address the recoverability of pre-death pain and suffering damages in light of *Zicherman*; (5) *BUT*, while the court below recognized that *Zicherman* rendered the district court's legal basis for the recovery of such damages untenable and, as a result, vacated the awards of pre-death pain and suffering damages, the courts in *Forman* and *Bickel II* declined to address the argument and thereby upheld similar awards.

Petitioners ignore this real and direct conflict and argue that a conflict exists only between the decision of the court below and various pre-*Zicherman* decisions which have recognized and allowed a general maritime law survival action for nonpecuniary damages to supplement the pecuniary damage restriction of DOHSA. *See* Petition at 10.[7] Petitioners fail to recognize that the post-*Zicherman* courts that have addressed the recoverability of nonpecuniary pre-death pain and suffering damages, save one[8], have concluded that *Zicherman* forecloses recovery of *all* nonpecuniary damages, including pre-death pain and suffering damages. As explained by the court below:

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[7] Petitioners' argument that the decision of the court below reversed *Evich v. Connelly*, 759 F.2d 1432, 1434 (9th Cir. 1985), *cert. denied*, 484 U.S. 914 (1987), is baseless. Petition at 10. *Evich* involved death actions arising in the *territorial waters* of the United States. DOHSA was not applicable.

[8] *See Beirn v. Korean Air Lines*, Nos. 83-4624, 83-4626, memo. op. (E.D.N.Y. Aug. 28, 1996) (reproduced herein at RA 14).

> We hold that the Supreme Court's reasoning in *Zicherman*, although directly dealing only with a claim for loss of society, effectively forecloses any claims under American law for nonpecuniary damages, including compensation for the grief of the survivors, and the pre-death pain and suffering of the victims.
>
> * * *
>
> The Supreme Court, in holding that DOHSA cannot be supplemented by general maritime law in order to obtain loss of society damages, gave no indication that there was any material difference between loss of society damages and any other nonpecuniary damages, all of which DOHSA expressly disallows. Nor can we find any basis for such a distinction.

Saavedra, 93 F.3d at 550-51, 554 (A 10, 19).

Upon this same rationale, the unanimous panel in *Bickel I* originally found that "the principle of *Zicherman* constitutes an *insuperable obstacle* to an award of pain and suffering damages" and the KAL 007 multidistrict litigation transferee district court, reversing its own pre-*Zicherman* 1993 ruling, concluded that such damages now are precluded by *Zicherman*. *See Bickel I*, 83 F.3d at 132 (emphasis added); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 935 F. Supp. 10, 15 (D.D.C. 1996), *interlocutory appeal granted*, No. 96-8013 (D.C. Cir. Aug. 15, 1996); *see also Bickel II*, 96 F.3d at 157-58 (Batchelder, J., dissenting); *contra Beirn*, memo. op. at RA 24-25.

In light of the conflicting decisions of the lower courts as to the effect of the intervening decision in *Zicherman* on pending, but undecided appeals, the Court should grant certiorari in this and in the *Forman* case, to resolve whether the pecuniary damage standard of DOHSA may be supplemented by *any* nonpecuniary damages, including pre-death pain and

suffering damages, on the basis of the Warsaw Convention, general maritime law or state law.

II

THE OTHER QUESTIONS PRESENTED DO NOT WARRANT REVIEW

The second and third questions presented by Petitioners do not warrant review by the Court. The decision of the court below in respect of these questions is not in conflict with any decision of the Court or with the decision of any other Circuit Court of Appeals, but is in accord with well settled legal principles and precedent.

A. Petitioners Elected to Proceed Under United States Law Alone

Petitioners seek review of an "alleged" conflict among the district courts regarding the "interplay between §§ 761/762 and § 764 of DOHSA." Petition at 12.[9] Petitioners fail to demonstrate that any conflict does exist or that § 764 of DOHSA even applies in these cases.

Petitioners accept that *Zicherman* requires a choice of law analysis in order to determine which sovereign's domestic law governs the types of recoverable compensatory damages available in a case to which the Warsaw Convention applies. Petition at 13. Petitioners and KAL agree that the issue of compensatory damages in these cases is governed by the law of the United States and, specifically, DOHSA. Petitioners argue, however, that they are entitled to all DOHSA damages and, through operation of § 764 of DOHSA, to all available damages under Korean law. Petition at 7, 12-13.

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[9] Section 761 of DOHSA permits a cause of action based upon American law and § 764 permits a cause of action based upon an applicable foreign law. 46 U.S.C. App. §§ 761, 764 (RA 13).

If, by agreement of the parties, as here, or by a choice of law analysis, it is determined that the law of the United States applies to determine the types of recoverable damages, then § 762 of DOHSA alone prescribes the types of recoverable damages for a death on the high seas. *See In re Korean Air Lines Disaster of September 1, 1983*, 935 F. Supp. 10, 14, n.2 (D.D.C. 1996) ("Because this Court has determined that United States law governs . . . and that DOHSA applies, Plaintiffs' argument that mental grief damages are available because Korean law permits claims for such damages is irrelevant"); *accord Beirn*, memo. op. at RA 28. Since the parties in these cases consented to the application of United States law, § 764 of DOHSA is not applicable and was irrelevant to the decision of the court below. Petitioners cannot now properly present a question for review which was irrelevant to the decision rendered.

Moreover, Petitioners fail to address the fact that the court below held that Petitioners had waived and affirmatively abandoned any application of Korean law in the district court. *Saavedra*, 93 F.3d at 552-53 (A 14a-17a). In rejecting Petitioners' argument for the application of both § 761 and § 764, the court below specifically noted that Petitioners had requested the district court to "delete any reference to Korean law, and to hold instead that survivor's grief damages were available directly under the Warsaw Convention". *Id.* at 552 (A 15a). Similarly, the court below rejected Petitioners' attempt to recover nonpecuniary damages for pre-death pain and suffering under § 764, because Petitioners never had advanced that argument in the district court. *Id.* at 553 (A 16a-17a). Thus, the court below did not reach Petitioners' argument that § 761 and § 764 of DOHSA are cumulative remedies.

Petitioners would have the Court simply ignore what transpired in the court below and grant review to resolve in a vacuum an "alleged" conflict among the district courts as to

whether the remedies of § 761 and § 764 of DOHSA are mutually exclusive. Petition at 7, 12-13.

There is no "conflict" among the district courts which warrants review by the Court. All courts which have addressed the issue directly have concluded that damages may *not* be recovered under both § 761 and § 764 of DOHSA. *See In re Korean Air Lines Disaster of Sept. 1, 1983*, 935 F. Supp. 10, 14, n.2 (D.D.C. 1996); *Beirn*, memo. op. at RA 27-28. *In re Air Crash Disaster Near Bombay, India on Jan. 1, 1978*, 531 F. Supp. 1175, 1186 (W.D. Wash. 1982); *Bergeron v. Koninklijke Luchtvaart Maatschappij, N.V.*, 188 F. Supp. 594, 596 (S.D.N.Y. 1960); *see also Park v. Korean Air Lines*, 24 Av. Cas. (CCH) 17,253, 17,260 & n.17, 1992 WL 331902 (S.D.N.Y. 1992). These decisions hold that, while § 764 allows a cause of action based upon foreign law to be brought in admiralty in federal court, it must first be determined that the foreign law even applies pursuant to a choice of law analysis. *Id.*; *see Noel v. Airponents, Inc.*, 169 F. Supp. 348, 350 (D.N.J. 1958). As discussed *supra* at 11-12, Petitioners already have agreed to the application of United States law.

The cases relied upon by Petitioners do not establish a conflict warranting intervention by the Court. Petition at 12. *Noel v. Linea Aeropostal Venezolana*, 260 F. Supp. 1002, 1006, n.24 (S.D.N.Y. 1966), recognized that its decision was consistent with *Bergeron*; *Heath v. American Sail Training Ass'n*, 644 F. Supp. 1459 (D.R.I. 1986), provides no analysis of § 761 and § 764; and *Powers v. Cunard S.S. Co.*, 32 F.2d 720 (2d Cir. 1925), does not address the issue.

B. The Court Below Properly Addressed and Decided the Effect of the Intervening *Zicherman* Decision on the Pending but Undecided Appeals

Petitioners argue that the court below lacked the authority to address and decide the recoverability of nonpecuniary predeath pain and suffering damages, pursuant to the doctrine of issue preclusion. Petition at 7, 14. Petitioners fail to articulate

how or why the doctrine applies or how the court below erred in addressing the effect of an intervening decision of the Court on the pending but undecided appeals.

An appellate court has a duty to apply retroactively intervening decisions of the Supreme Court interpreting a statute or treaty to all cases still open to direct review. *Rivers v. Roadway Express*, 114 S. Ct. 1510, 1519 (1994); *see Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 96 (1993); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 540-545 (1991). In addition, it is well settled that an appellate court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law. *See United States National Bank of Oregon v. Independent Insurance Agents*, 508 U.S. 439, 446-48 (1993). As noted by the Court in *Bank of Oregon*, an appellate court may consider an issue antecedent to and ultimately dispositive of the dispute before it, even an issue the parties fail to identify or brief. *Bank of Oregon*, 508 U.S. at 445-47. In advancing the "issue preclusion" argument, Petitioners simply ignore these decisions of the Court.

Petitioners concede that under *Zicherman* "the types of recoverable damages in an action governed by the Warsaw Convention must be determined by reference to domestic law. . . ." Petition at i. Thus, Petitioners cannot escape the fact that *Zicherman* eliminated the **sole** legal basis upon which the district court in these cases had allowed the recovery of all nonpecuniary damages, including pre-death pain and suffering damages.[10] After *Zicherman*, the court below was required to find a domestic law basis for the award of nonpecuniary pre-death pain and suffering damages, which in turn *obligated*

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[10] Any argument that *Zicherman* applies only with regard to wrongful death damages is unfounded. *See* Petition at 13. The Court's holding in *Zicherman* is not limited to wrongful death, but applies to the determination of *all* "damages" recoverable in an action governed by the Warsaw Convention.

the court below to address the question whether such non-pecuniary damages are recoverable under DOHSA, the applicable domestic law in this case. *See Pescatore v. Pan Am World Airways*, 97 F.3d 1 (2d Cir. 1996). Neither issue preclusion, nor any related doctrine, could serve to preclude the court below from addressing and deciding the effect of *Zicherman* on the pending but undecided appeals.

CONCLUSION

The Court should grant the Petition herein, together with the Petition in *Korean Air Lines v. Forman*, No. 96-530 (U.S., docketed Oct. 3, 1996), in order to resolve the conflict which now exists in the Courts of Appeals and in the district courts, as to the proper application and effect of the intervening decision of the Court in *Zicherman* on the recoverability of non-pecuniary damages for pre-death pain and suffering under DOHSA. The Petition herein otherwise should be denied.

Dated: November 6, 1996

Respectfully submitted,

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APPENDIX

INDEX TO APPENDIX

PAGE

1. Order Declaring Applicable Law of Judge Hill, dated October 19, 1992..... RA1

2. Order Amending Order of October 19, 1992 Denominated "Order Declaring Applicable Law" of Judge Hill, dated July 16, 1993 ..... RA5

3. Order of the Court of Appeals for the Ninth Circuit requesting supplemental briefing, dated March 6, 1996 (Saavedra/Yamaguchi) RA8

4. Order of the Court of Appeals for the Ninth Circuit granting Korean Air Lines Co., Ltd.'s motion for supplemental briefing, dated March 6, 1996 (Saavedra/Okai)..... RA10

5. Relevant Provisions of the Warsaw Convention
   Article 17 ..... RA12
   Article 24 ..... RA12

6. Relevant Provisions of the Death on the High Seas Act, 46 U.S.C. App. § 761 *et seq.*
   46 U.S.C. App. § 761 ..... RA13
   46 U.S.C. App. § 762 ..... RA13
   46 U.S.C. App. § 764 ..... RA13

7. *Beirn v. Korean Air Lines*, Nos. 83-4624, 83-4626, memo. op. (E.D.N.Y. Aug. 28, 1996)..... RA14

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Nos. CV84-9324-IH
CV84-9329-IH
CV84-9330-IH
CV84-9334-IH
CV84-9343-IH
CV85-4869-IH
CV85-5327-IH
CV85-5329-IH
CV85-5490-IH

Filed October 19, 1992

KIMBERLY S. SAAVEDRA, et al.,

Plaintiffs,

—v.—

KOREAN AIR LINES CO., LTD., et al.,

Defendants.

ORDER DECLARING APPLICABLE LAW

There came before the Court on September 21, 1992, certain motions, listed below, to declare applicable law with respect to damage issues. By stipulation of counsel, the said motions were deemed to apply to each and every case listed in the caption of this order. The motions were:

Motion No. 1: Motion of defendant Korean Air Lines Co., Ltd. ("KAL") filed August 17, 1992, and denominated "Motion Re Applicable Damage Law".

Motion No. 2: Motion of defendant KAL filed August 17, 1992, denominated "Motion to Strike Jury Demand".

Motion No. 3: Motion of plaintiffs filed August 14, 1992, denominated "Motion to Award Prejudgment Interest at the Prime Rate".

Appearances were as follows: For defendant KAL, Condon & Forsyth by Stephen R. Ginger, Esq. and Victor M. Bartholetti, Esq.; and for plaintiffs, Speiser, Krause, Madole and Cook by Juanita M. Madole, Esq. and Belli, Belli, Brown, Monzione, Fabbro & Zakaria by Richard Brown, Esq.

The Court, having considered each said motion together with the points and authorities, evidence and other documents filed in support and in opposition thereto, and having heard argument, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. *As to Motion No. 1.* plaintiffs' claims for wrongful death are governed by the Warsaw Convention.[1] The elements of plaintiffs' claim for wrongful death in these cases are defined by reference to the Death on the High Seas Act, 46 U.S.C. Sec. 761 et seq. Plaintiffs' claims for wrongful death are limited to items of pecuniary damages. The pecuniary damages recoverable in these cases include, and are limited to, damages for loss of support, damages for loss of services, damages for loss of nurture, damages for loss of inheritance and funeral and burial expenses.

There are certain issues under Motion No. 1 that are as yet undecided. They are: Which relatives are entitled to damages for each of the items of damage listed above in this paragraph

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000 (1934), T.S. No. 876, 1137 L.N.T.S. 11, *reprinted* in 49 U.S.C. Sec. 152 note (1976).

and what showing, if any, of dependency is required for any relative to be so entitled. Those questions will be heard and decided on November 2, 1992, at 2 P.M. The briefing will be as follows: Plaintiffs' are to make the motion with respect to these items and file their motion and opening brief not later than October 5 1992. Defendants' opposition shall be filed not later than October 15, 1992. Plaintiffs' reply, if any, shall be filed not later than October 21, 1992.

Also as to *Motion No. 1*, plaintiffs are entitled to assert and recover, upon an appropriate showing, a survival claim for the decedents' predeath pain and suffering, based on Article 17 of the Warsaw Convention.

Plaintiffs are also entitled to assert and recover, upon an appropriate showing, a claim for the mental anguish and grief of decedents' relatives, said claim being based on Korean law. Said claim is allowable pursuant to 47 U.S.C. Sec. 764.

2. As to *Motion No. 2:* Plaintiffs' jury demand is deemed valid and proper and the motion to strike the jury demand is denied.

3. As to *Motion No. 3:* Prejudgment interest is recoverable of the following items:

a) The past mental anguish, grief and sorrow of decedents' relatives;

b) Plaintiffs' survival claim for predeath pain and suffering of decedents.

c) Plaintiffs' claim for past support which would have been provided by decedent, prejudgment interest being payable from the date of the accident to the date of the judgment fixing damages. Prejudgment interest shall be compounded annually. The rate of prejudgment interest will be the rate for 52-Week T-Bills as set forth in 28 U.S.C. Sec. 1961.

4. A transcript of the proceedings in open court on September 21, 1992, shall be filed when produced. It is incorporated

herein by reference. The transcript shall constitute the Court's further findings and conclusions as well as a further statement of the Court's reasons.

5. The Clerk shall transmit a copy of this order by U.S. mail to all counsel of record.

DATED: October 19, 1992.

/s/ IRVING HILL
IRVING HILL, Judge
United States District Court

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Nos. CV84-9324-IH
CV84-9329-IH
CV84-9330-IH
CV84-9334-IH
CV84-9343-IH
CV85-4869-IH
CV85-5327-IH
CV85-5329-IH
CV85-5490-IH

Filed July 16, 1993

KIMBERLY S. SAAVEDRA, et al.,

Plaintiffs,

—v.—

KOREAN AIR LINES CO., LTD., et al.,

Defendants.

ORDER AMENDING ORDER OF OCTOBER 19, 1992 DENOMINATED "ORDER DECLARING APPLICABLE LAW"

There came before the Court for hearing on July 6, 1993, a motion by plaintiff filed May 25, 1993 denominated as plaintiff's "Supplemental Motion Regarding Applicable Law".

Appearances were as follows: For plaintiffs, Speiser, Krause, Madole & Cook by Juanita M. Madole, Esq.; and Herrmann & Associates by Charles Herrmann, Esq., and for defendant Condon & Forsyth by Stephen R. Ginger, Esq. and Kevin Sutherland, Esq.

The said motion sought amendment of the Court's order filed October 19, 1992 and denominated "Order Declaring Applicable Law" in two separate aspects.

Proposed Amendment No. 1: Plaintiff sought amendment of the said order of October 19, 1992, as to page 2, lines 15 through 19 thereof. Plaintiff sought to delete from said lines the reference to Death on the High Seas Act, and also to delete the sentence on lines 18-19 limiting claims to items of pecuniary damage.

The motion also sought the addition of new language in paragraph 1 of the order at page 2 which would allow recovery of non-pecuniary damage items.

The Court, having considered the said motion as to this aspect, together with the points and authorities, and other documents filed in support thereof and in opposition thereto, and having heard argument, this aspect of the motion is denied.

Proposed Amendment No. 2: Plaintiff's motion also sought the deletion of a paragraph starting at page 3, line 14 of said order of October 19, 1992, and ending at line 17 of said page 3. Plaintiff sought to have new language inserted to the effect that claims for mental anguish and grief of decedents' relatives would be based on the Warsaw Convention only and not on Korean law. Plaintiff's motion also sought the deletion from the paragraph of any reference to Death on the High Seas Act. Further, Plaintiff's motion sought to add a requirement that recovery for mental anguish and grief be allowed only if accompanied by physical manifestations.

The Court, having considered this second aspect of the motion together with the with the points and authorities, and other documents filed in support thereof and in opposition

thereto, and having heard argument, the Court orders that this aspect of the motion is granted and finds that no prejudice is shown to defendant from so ordering.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Page 3, lines 14 through 17 inclusive of said order of October 19, 1992, are deleted and the following language substituted in place thereof:

> "Plaintiffs are also entitled to assert and recover, upon an appropriate showing, a claim for the mental anguish and grief of decedents' relatives, said claim being based on the Warsaw Convention, provided the showing of such mental anguish and grief as to each decedents' relative involved is accompanied by a showing of physical manifestations of said relative."

2. A transcript of the proceedings in open court on July 6, 1993, shall be filed when produced. It is incorporated herein by reference. It shall constitute the Court's further findings of fact and conclusions of law as well as a further statement of the Court's reasons.

3. The Clerk shall transmit a copy of this order by U.S. mail to all counsel of record.

DATED: July 16 , 1993.

/s/ IRVING HILL
IRVING HILL, Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 94-55018
94-55060
94-55161

D.C. No. CV-84-9324

Central California

Filed March 6, 1996

KIMBERLY SAAVEDRA, as Special Administratrix of the Estate of MASAKAZU YAMAGUCHI, deceased, and as Personal Representative of MAKIKO YAMAGUCHI, CHISATO YAMAGUCHI, MAMI YAMAGUCHI, MASASHI YAMAGUCHI, MASAO YAMAGUCHI, KAZUE YAMAGUCHI, KAZUHIKO YAMAGUCHI,

Plaintiffs-Appellees/
Cross-Appellants,

—v.—

KOREAN AIR LINES CO., LTD.,

Defendant-Appellant/
Cross-Appellee.

ORDER

The court on its own motion requests supplemental briefing in light of the Supreme Court's decision in *Zicherman v. Korean Air Lines Co., Ltd.*, 116 S. Ct. 629 (1996).

Both parties may file supplemental briefs, not to exceed fifteen pages, addressing how *Zicherman* applies to the issues raised on appeal. These briefs are due no later than March 18, 1996. No motions for extension of time will be granted.

Alternatively, parties may notify this court by March 18, 1996, that they do not wish to submit a supplemental brief.

For the Court:

/s/ KENT L. BRINTNALL
Kent L. Brintnall
Deputy Clerk/Staff Attorney
9th Cir. R. 27-7/Gen. Ord.
U.S. Court of Appeals, App. A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 94-55495
94-55496

D.C. No. CV-84-9329

Central California

Filed March 6, 1996

KIMBERLY SAAVEDRA, as Special Administratrix of the Estate of MAKOTO OKAI, deceased, and as Special Administratrix of the Estate of YOOKO OKAI, deceased,

Plaintiff-Appellant/
Cross-Appellee,

—v.—

KOREAN AIR LINES CO., LTD.,

Defendant-Appellee/
Cross-Appellant.

ORDER

Korean Air Lines's motion for supplemental briefing is granted.

Both parties may file supplemental briefs, not to exceed fifteen pages, addressing how *Zicherman v. Korean Air Lines Co., Ltd.*, 116 S.Ct. 629 (1996), applies to the issues raised on

appeal. These briefs are due no later than March 18, 1996. No motions for extension of time will be granted.

Alternatively, parties may notify this court by March 18, 1996, that they do not wish to submit a supplemental brief.

For the Court:

/s/ KENT L. BRINTNALL
Kent L. Brintnall
Deputy Clerk/Staff Attorney
9th Cir. R. 27-7/Gen. Ord.
U.S. Court of Appeals, App. A

Relevant Provisions of The Warsaw Convention

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 3018.

Article 24

1. In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

2. In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

49 Stat. 3020.

Relevant Provisions of the Death on the High Seas Act, 46 U.S.C. § 761 *et seq.*

§ 761. Right of action; where and by whom brought

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

§ 762. Amount and apportionment of recovery

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

§ 764. Rights of action given by laws of foreign countries

Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

83-CV-4624 (TCP)
83-CV-4626 (TCP)

MARIA BEIRN, Executrix of the Estate of JAMES BEIRN, deceased, and ROBERT SPEIR, Executor of the Estate of KATHY BROWN SPEIR, deceased,

Plaintiffs,

—against—

KOREAN AIR LINES CO., LTD.,

Defendant.

MEMORANDUM AND ORDER

PLATT, District Judge,

Defendant Korean Air Lines, Co., Ltd., ("KAL"), has moved this Court, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for an Order dismissing plaintiffs' claims for nonpecuniary damages for: (1) loss of society; (2) survivor's grief; (3) pre-death pain and suffering of the decedent; and (4) loss of non-physical services.

Because the U.S Death on the High Seas Act ("DOHSA") does not provide for awards of nonpecuniary damages in wrongful death actions, defendant's motion is granted with respect to plaintiffs' claims for loss of society and survivor's

grief. Plaintiffs' claims for loss of non-physical services also are dismissed, except for the claims for loss of services brought on behalf of the decedents' minor dependents.

Defendant's motion is denied, however, with respect to plaintiffs' claims for the decedents' pre-death pain and suffering. Because a survival action exists under general maritime law; and because neither Congress, the Supreme Court, nor the Second Circuit has, to date, deemed DOHSA to be the exclusive remedy for deaths occurring on the high seas; and because of offensive collateral estoppel may well be applicable in this case; plaintiffs have a legal basis for pursuing these damages in a supplemental survival action.

BACKGROUND

Kathy Brown Speir and James Beirn (the "decedents") were passengers on Korean Air Lines flight 007, which was shot down by Soviet military aircraft on September 1, 1983. Plaintiffs filed the instant actions to recover damages on behalf of themselves, the decedents' estates, and the decedents' minor dependents.[1] KAL's liability for the accident was determined in the context of multidistrict litigation proceedings in the District Court for the District of Columbia. *See In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475 (D.C. Cir.) (upholding the district court's finding of willful misconduct), *cert. denied*, 502 U.S. 994 (1991). Therefore, the only issues remaining for trial are the nature and quantum of recoverable compensatory damages.

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[1] Plaintiff Robert Speir seeks damages on behalf of decedent's daughter, Aimee Claire Brown. Plaintiff Maria Beirn seeks damages on behalf of decedent's step-daughter, Rosa Maria Salvador Lindez.

DISCUSSION

These actions are governed by the Warsaw Convention,[2] as they arise out of an incident involving international transportation by air. *In re Air Disaster at Lockerbie, Scotland, on Dec. 21, 1988*, 928 F.2d 1267, 1274-80, *cert. denied*, 502 U.S. 920 (1991) ("*Lockerbie I*"). While the Warsaw Convention is applicable, it does not address the issue of recoverable compensatory damages, but instead relegates such matters to the laws of the nation in which the action is filed. *Zicherman*, 116 S. Ct. at 632-35.

In light of the Supreme Court's recent decision in the *Zicherman* case, it is clear that the Death on the High Seas Act (DOHSA), 46 U.S.C.A. § 761 *et seq.*, is the internal law of the United States that applies to all wrongful deaths occurring on the high seas.[3] 116 S. Ct. at 636-37. Further, it is clear that DOHSA does not provide for an award of nonpecuniary damages. 46 U.S.C. § 762; *Zicherman*, 116 S. Ct. at 636-37.

In their motion papers, plaintiffs do not contest defendant's argument that loss of society damages are unavailable under DOHSA. Moreover, plaintiffs do not offer an alternative theory of recovery of these damages. Thus, in light of the Supreme Court's decision in *Zicherman*; defendant's motion to dismiss plaintiffs' claims for loss of society may be granted at this juncture.

Nonetheless, plaintiffs do set forth three theories under which they contend that damages for decedent's pre-death pain and suffering, survivor's grief, and non-physical services may be recovered:

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[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934) (reprinted in note following 49 U.S.C. § 1502 (1988 ed.)).

[3] Defendant asserts that U.S. law applies to this action because decedents were U.S. citizens and residents and all of the claimants are U.S. residents. (Mem. of Points and Authorities in Support of Def. KAL's Motion to Dismiss Nonpecuniary Claims at 3 n. 4.) Plaintiffs do not contest this assertion.

(1) plaintiffs may bring a survival action under general maritime law to supplement their wrongful death action governed by DOHSA, for an award of nonpecuniary damages for decedent's pre-death pain and suffering;

(2) plaintiffs may take advantage of both § 761 and § 764 of DOHSA, thus allowing plaintiffs to recover nonpecuniary damages for decedent's pre-death pain and suffering and survivor's grief under Korean law; and

(3) damages for nonphysical services are recoverable as pecuniary damages under DOHSA.

The Court finds all but the first of these theories to be without merit and will address each theory in turn.

A. Supplementing DOHSA with General Maritime Law

1. The Parties' Arguments

At the outset, plaintiffs emphasize that DOHSA is a wrongful death statute. *See* 46 U.S.C. § 761. Therefore, it provides a right of action for damages "for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative" against the corporation that would have been liable had death not ensued. *Id.* Typically, wrongful death remedies compensate a decedent's beneficiaries for the losses they sustained as a result of the decedent's death, such as loss of support and financial contributions, loss of inheritance, and loss of services. *See* W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 127, at 949 (5th ed. 1984). Under section 762 of DOHSA, the damages available for a wrongful death occurring on the high seas are limited to "*pecuniary* loss sustained by persons for whose benefit the suit is brought." 46 U.S C. § 762 (emphasis added). For this reason, plaintiffs attempting to recover nonpecuniary damages for loss of society and survivor's grief under DOHSA have been consistently

unsuccessful. *E.g.*, *Zicherman*; *Bickel v. Korean Air Lines*, Nos. 93-2144/2259/2549; 94-1095/1096/1098/1100/1101, 1996 WL 203349, *5-*6 (6th Cir. Apr. 29, 1996); *In re Korean Air Lines Disaster of Sept. 1, 1983*, Nos. 83 Civ. 2793, 83 Civ. 2940, 84 Civ. 0331, 84 Civ. 0332, 84 CV-1710 (D.D.C. June 4, 1996).

Plaintiffs argue, however, that they are entitled to nonpecuniary damages under general maritime law for the decedents' pre-death pain and suffering. Under plaintiffs' theory, a survival action governed by general maritime law may supplement their wrongful death claims governed by DOHSA. In support of this theory, plaintiffs contend that courts have consistently recognized the distinction between wrongful death and survival actions and the different remedies that each claim affords. *E.g.*, *Azzopardi v. Ocean Drilling and Exploration Co.*, 742 F.2d 890, 893 (5th Cir. 1984) (citing *Sealand Services Inc. v. Gaudet*, 414 U.S. 573, 575 n. 2 (1974)); *Ospina v. Trans World Airlines*, 778 F. Supp. 625, 629 (E.D.N.Y. 1991). Whereas wrongful death compensates the decedent's beneficiaries for the losses they sustained as a result of the decedent's death, survival actions compensate the personal representative of the decedent's estate for damages that the decedent could have recovered but for death. *See Yamaha Motor Corp. v. Calhoun*, 40 F.3d 622, 737-38 (3d Cir. 1994) (explaining the distinction between a wrongful death cause of action and an action for pre-death pain and suffering), *aff'd*, 116 S. Ct. 619 (1996).

It is undisputed that DOHSA is the U.S. law that applies to all wrongful deaths occurring on the high seas. DOHSA is silent, however, as to whether it should also serve as the basis for survival actions. Therefore, according to plaintiffs, Congress has left a gap in DOHSA's coverage.

As a result of this gap, plaintiffs argue that general maritime law survival actions should be permitted to supplement DOHSA. Plaintiffs rely upon *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), in which the Supreme Court established a general maritime action for wrongful death occurring in ter-

ritorial waters. Following the Supreme Court's decision in *Moragne*, numerous other courts expanded upon the Supreme Court's holding and allowed plaintiffs to bring survival actions under general maritime law, in addition to wrongful death actions governed by DOHSA. *E.g.*, *Barbe v. Drummond*, 507 F.2d 795, 799-800 (5th Cir. 1974); *Azzopardi*, 742 F.2d 890, 893-94 (5th Cir. 1984); *Ospina v. Trans World Airlines*, 778 F. Supp. 625, 630, 636 (E.D.N.Y. 1991), *rev'd on other grounds*.

In contrast, defendant argues that Congress intended DOHSA to be the exclusive remedy for actions arising out of deaths on the high seas and that courts are not free to supplement this remedy. *See, e.g.*, *Yamaha Motor Corp. v. Calhoun*, 116 S. Ct. 619, 628 (1996); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 30-36 (1990); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 232 (1986); *Mobile Oil Corp. v. Higginbotham*, 436 U.S. 618, 624-45 (1978). Defendant argues that Congress was fully aware of the distinction between wrongful death and survival actions when it enacted DOHSA; in fact, a few weeks after it enacted DOHSA, Congress enacted the Jones Act, which specifically provides a survival remedy for pain and suffering for seamen. Furthermore, after the Supreme Court refused to supplement the Federal Employers' Liability Act ("FELA") with a state survival provision that was not statutorily prescribed, Congress amended FELA to provide a survival action in addition to the wrongful death remedy. This demonstrates, defendant claims, that if Congress had intended to allow survival actions for deaths on the high seas, it would have provided for a survival action under DOHSA.

Further, defendant contends that plaintiffs' reliance on *Moragne* is improper, because the death that occurred in that case was in territorial waters. Therefore, DOHSA did not apply, and the Court created a general maritime wrongful death remedy for the beneficiaries of the deceased seaman. For a death occurring on the high seas, however, defen-

dant says DOHSA does apply, and it preempts general maritime law and provides an exclusive remedy.

Moreover, defendant disagrees that DOHSA leaves a gap that may be filled by a general maritime law survival action. Defendant distinguishes between the situation in *Moragne* where Congress had not legislated a wrongful death action applying to territorial waters, and the present situation where Congress has legislated a wrongful death action. Moreover, as the Supreme Court stated in *Mobile Oil Corp. v. Higginbotham*, 436 U.S. at 625, "Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of nonpecuniary supplements." Therefore, any supplemental actions would effectively override DOHSA's intended exclusivity.

Accordingly, under defendant's theory of DOHSA, plaintiffs in the present case are precluded from recovering nonpecuniary damages in supplemental survival actions under general maritime law.

2. Analysis

The issue that this Court must decide is whether DOHSA is the exclusive remedy under U.S. law for a death occurring on the high seas, or whether DOHSA may be supplemented by a survival claim under general maritime law. Neither the Supreme Court nor the Second Circuit has specifically addressed this issue. This Court has previously held, however, that DOHSA is *not* the exclusive U.S. law applicable to deaths occurring on the high seas for purposes of demanding a jury trial. *Yun v. Korean Air Lines*, 798 F. Supp. 755 (E.D.N.Y. 1992) (Platt, J.). In *Yun*, this Court also held that the Warsaw Convention creates a separate cause of action for wrongful death and survival. *Id.* at 762. This Court's decision in *Yun* has not yet been overturned, or even questioned. Therefore, under *Yun*, at least plaintiffs may be entitled to bring a survival action.

Even assuming, *arguendo*, that the Warsaw Convention does not specifically authorize a survival action, it also clearly does not preclude one, instead leaving it to the courts of the forum nation to determine whether a survival action exists under its laws.[4] Plaintiffs argue that pre-death pain and suffering is a harm cognizable under U.S. maritime law. In response, defendant argues that under this country's laws, DOHSA—a wrongful death statute that does not allow for recovery of nonpecuniary damages—is the exclusive remedy.

The Supreme Court's decision in *Zicherman* does not, in our view, completely resolve this issue. It is true that in the *Zicherman* opinion, the Supreme Court uses language appearing to reject the idea that general maritime law may apply to causes of action brought under the Warsaw Convention. *Zicherman*, 116 S. Ct. at 636. Instead, the Supreme Court arguably seems to indicate that DOHSA may apply exclusively to these actions:

> We conclude that Articles 17 and 24(2) of the Warsaw Convention permit compensation only for legally cognizable harm, but leave the specification of what harm is

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[4] Article 17 of the Warsaw Convention, as set forth in the official American translation of the governing French text, provides:

> The carrier shall be liable for damage [injury] sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage [injury] so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 3018 (emphasis added). It is important to note that the word "dommage," correctly translated from the French, means "injury," not "damages" or "damage." This is borne out by the correct translation of "any other bodily injury" in this same sentence.

In *Zicherman*, the Supreme Court rejected the argument that the word "damage" should be interpreted in its broadest sense in that we take the English dictionary definition. Instead, the Supreme Court determined that "damage" refers to legally cognizable harm, but leaves it to the adjudicating courts to specify what harm is cognizable. 116 S. Ct. at 633.

> legally cognizable to the domestic law applicable under the forum's choice-of-law rules. Where, as here, an airplane crash occurs on the high seas, DOHSA supplies the substantive United States law. Because DOHSA permits only pecuniary damages, petitioners are not entitled to recover for loss of society.

Id. at 637.

It is of the utmost significance, however, that the only issue on appeal to the Supreme Court in *Zicherman* was whether nonpecuniary damages for loss of society were available under DOHSA. Loss of society is a wrongful death remedy, as it compensates surviving family members for loss of a loved one. The issue was *not* whether a survival claim could supplement a wrongful death action governed by DOHSA. Therefore, to interpret any language in the *Zicherman* opinion as limiting a plaintiff's remedy under the Warsaw Convention to wrongful death may, in our opinion, be an improper expansion of that case's holding. At most, it seems to us that the holding in *Zicherman* may be applied to other cases where plaintiffs seek nonpecuniary damages in a wrongful death action governed by DOHSA. *See, e.g., Bickel* 1996 Westlaw 203349, at *5 (holding that nonpecuniary damages for survivor's grief are unavailable under DOHSA).

Moreover, we should not overlook that the plaintiffs in *Zicherman* did bring a survival claim, and the award made pursuant to that claim was not challenged. The plaintiffs brought their survival claim under the Warsaw Convention, and, as in the instant case, they sought nonpecuniary damages for decedent's conscious pain and suffering. 116 S. Ct. at 631. The plaintiffs in that case received $100,000 from the jury, and that award was left intact both by the Second Circuit, *Zicherman v. Korean Air Lines*, 43 F.3d 18 (1994), and the Supreme Court, 116 S. Ct. at 631 n. 1. Therefore, it may be inappropriate to assume that the Supreme Court meant by its language in the *Zicherman* opinion to preclude recovery of survival damages, particularly in these cases.

The Supreme Court's decision in *Higginbotham* also does not support defendant's proposition that general maritime law may not supplement DOHSA. In *Higginbotham*, the Supreme Court was faced with the question of "whether, in addition to the damages authorized by [DOHSA], a decedent's survivors may also recover damages under general maritime law." 436 U.S. at 618. The Supreme Court held that where DOHSA applies, it may not be supplemented by general maritime law to allow recovery for loss of society. Like *Zicherman*, the Court in *Higginbotham* only addressed the issue of wrongful death remedies, not survival remedies.[5] Therefore, like *Zicherman*, this opinion should not be expanded beyond its specific holding. The limitations that *Zicherman* and *Higginbotham* place on the recoverable damages in a wrongful death action should not necessarily have a preclusive effect on a survival action. *See Azzopardi*, 742 F.2d at 893-94; *Barbe v. Drummond*, 507 F.2d 795, 800 (5th Cir. 1974); *McAleer v. Smith*, 791 F. Supp. 923, 926 (D.R.I. 1992).

This conclusion is entirely consistent with Justice Harlan's statement in *Moragne*: "We conclude that the Death on the High Seas Act was not intended to preclude the availability of a remedy for wrongful death under general maritime law in situations not covered by the Act." 398 U.S. at 1788 (footnote omitted). The instant situation, where plaintiffs as representatives of decedents' estates seek survival damages for the decedents' pre-death pain and suffering, may be considered a situation "not covered by the Act." Therefore, as in *Moragne*, there is no reason to assume that in enacting DOHSA, Congress intended to preclude a survival remedy.

Indeed, contrary to some present thinking, Justice Harlan's view of the history and purpose of DOHSA was:

> Read in light of the state of maritime law in 1920, we believe this legislative history indicates that Congress intended to ensure the continued availability of a remedy, historically provided by the States, for deaths in ter-

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[5] The dicta quoted above at pp. 9-10 addressed "DOHSA beneficiaries" who are not necessarily the same as survival beneficiaries.

> ritorial waters; its failure to extend the Act to cover such deaths primarily reflected the lack of necessity for coverage by a federal statute, rather than an affirmative desire to insulate such deaths from the benefits of any federal remedy that might be available independently of the Act. The void that existed in maritime law up until 1920 was the absence of any remedy for wrongful death on the high seas. Congress, in acting to fill that void, legislated only to the three-mile limit because that was the extent of the problem. The express provision that state remedies in territorial waters were not disturbed by the Act ensured that Congress' solution of one problem would not create another by inviting the courts to find that the Act pre-empted the entire field, destroying the state remedies that had previously existed.
>
> * * * *
>
> To put in another way, the message of the Act is that it does not by its own force abrogate available state remedies; no intention appears that the Act have the effect of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law.
>
> * * * *
>
> Respondents argue that overruling *The Harrisburg* [119 U.S. 199 (1886)] will necessitate a long course of decisions to spell out the elements of the new "cause of action." We believe these fears are exaggerated, because our decision does not require the fashioning of a whole new body of federal law, but merely removes a bar to access to the existing general maritime law. In most respects the law applied in personal-injury cases will answer all questions that arise in death cases.

398 U.S. at 1786-187, 1790 (footnotes omitted). In essence, Justice Harlan was saying that section 7 of the Act, which provides that "[t]he provisions of any State statute giving or regulating rights of action or remedies for death shall not be

affected by this [Act]," 46 U.S.C.A. § 767, "does not by its own force abrogate available state remedies [or] have the effect of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law," 38 U.S. at 1787. In short, the Act does not preclude survivor's actions or remedies for pain and suffering.

Under the circumstances, from a purely practical standpoint, it behooves us at this juncture to try these second or survivors' claims with the wrongful death claims and reach separate but joint verdicts. If we are wrong, the survivors' verdicts may simply be vacated by the Appellate Courts.

3. Conclusion

The Supreme Court has not yet been faced with the issue of whether DOHSA may be supplemented by general maritime law, allowing for a recovery of nonpecuniary survival damages. That Court has given tacit approval to survival actions, however, in that it left untouched a $100,000 jury award for pain and suffering in the *Zicherman* decision. *See* 116 S. Ct. at 631 n. 1. Furthermore, this Court's holding in *Yun* remains intact as the current law in this District on the matter of DOHSA's exclusivity. Therefore, plaintiffs may not necessarily be precluded from bringing a survival claim for the decedents' pre-death pain and suffering, and defendant's motion to dismiss this claim for lack of a legal basis must be denied, at least at this point in time.

In reaching this conclusion, the Court rejects the reasoning of other Courts holding that DOHSA is the exclusive remedy for a death occurring on the high seas. *E.g.*, *Saavedra v. Korean Air Lines*, Nos. 94-55018, 94-55495, 94-55060, 94-55496, 94-55161, 1996 Westlaw 431734 (9th Cir. Aug. 2, 1996); *Bickel*, 1996 Westlaw 203349; *In re Korean Air Lines Disaster of Sept. 1, 1983*, Nos. 83 Civ. 2793, 83 Civ. 2940, 84 Civ. 0331, 84 Civ. 0332, 84-CV-1710 (D.D.C. June 4, 1996).

In fact, it was while the instant motion was pending before this Court that we received by Federal Express from the law firm of Tompkins, Harakas, Elsasser & Tompkins, the law

firm generally acknowledged to be the "Dean" of the aviation bar, and in particular from the named partner thereof who argued the *Zicherman* case in the Supreme Court and the *Saavedra* case in the Ninth Circuit, a copy of the Court's decision in the latter case. While we have the greatest respect for all Circuit Court decisions, we may not overlook, as the Ninth Circuit may have done, the fact that the very lawyer who for whatever reason failed to seek certiorari when he had the chance on the key issue of DOHSA's exclusivity now seeks to have it in effect "both ways" as to different plaintiffs in what ultimately is essentially the same case. This unquestionably is acceptable advocacy and not improperly made in the best interests of one's clients. Nonetheless, it is an argument that this Court is unable to accept in this case, and apparently it is unacceptable to the Court of Appeals for the District of Columbia also. *See Forman v. Korean Air Lines Co.*, 84 F.3d 446, 448-49 (D.C. Cir. 1996).

We are dealing after all with a great many plaintiffs all killed, without any fault on their part, in a tragic "accident" (if in this case it may charitably to the former U.S.S.R. be so called) that "happened" not over land as in *Lockerbie* (or in territorial waters as in *Moragne*), but over the high seas, because that is where the plane was shot down. Survivors of victims on U.S. domestic flights and on international flights that terminate over land or territorial waters are accorded the full panoply of damages that the States or country, as the case may be, afford survivors in so-called wrongful death cases. These damages include dependent survivors' compensatory damages and other benefits, as well as full compensation to every decedent's estate for the pain and suffering endured by the decedent prior to his or her death. These benefits also were awarded to the *Zicherman* plaintiffs despite the fact that their airplane crashed over the high seas because, as the Ninth Circuit perceived, the Supreme Court "declined to address pain and suffering only because that award was not challenged on petition for certiorari." *Saavedra*, 1996 Westlaw 431734, at *7. Because that award was not challenged, one group of plaintiffs in the same plane crash is going to end up

with a large award sanctioned by one of our intermediate Appellate Courts, and another group is not.

Moreover, while perhaps not the "law of the case," it would certainly seem to fit the definition of offensive collateral estoppel or "issue preclusion" as it is called now, at least as against the defendant which had a full and fair opportunity to litigate this question to and beyond the Court of Appeals for the Second Circuit and chose not to do so.

We are considering here widows, orphans, and next of kin who have had to endure and live with a shattering tragedy, and for whom perhaps we are painting a picture in their minds of gross unfairness. One need only place oneself in the shoes of one of the survivors in this case who is being treated differently than others to realize how potentially unjust this result must appear to them to be. Let others subscribe to it, this Court in good conscience may not do so.

B. *The Applicability of Korean Law*

Under their second theory of recovery, plaintiffs argue that § 761 and § 764 of DOHSA may be applied concurrently. Under this theory, plaintiffs may take advantage of U.S. law pursuant to DOHSA § 761, thus recovering pecuniary damages. In addition, plaintiffs may also take advantage of Korean law pursuant to DOHSA § 764, thus recovering non-pecuniary damages for decedent's pre-death pain and suffering and survivor's grief under the Korean Civil Code. Although neither the Supreme Court nor the Second Circuit has definitively resolved the issue of whether these two sections may be applied concurrently, the correct result is that damages under these sections are mutually exclusive.

Preliminarily, this Court must determine whether § 764 of DOHSA is at all applicable to the instant case. Both sides concede that this action is governed by the Warsaw Convention and that a choice of law analysis conducted pursuant to the Convention dictates that U.S. law applies. *See infra* note 3; *see also Zicherman v. Korean Air Lines*, 116 S. Ct. 629, 637 (1996). Accordingly, § 762 of DOHSA is applicable

because it measures recoverable damages in actions brought under U.S. law. While § 764 also governs the measure of damages, it does so only in matters brought under *foreign* law. Because this case is based on United States law, § 764 is inapplicable, and plaintiffs may not recover damages under Korean law.

Even if § 764 were applicable, it may not be applied concurrently with § 762. Sections 762 and 764 were enacted to ensure that there is some basis for recovery for American victims of wrongful death on the high seas. *Bergeron v. K.L.M. Royal Dutch Airlines*, 188 F. Supp. 594, 597 (S.D.N.Y. 1960). Congress did not intend, however, for parties to have access to both bases of recovery; rather, it intended to enable parties to maintain causes of action under one of these sections. *Id.* at 596; *Bowden v. Korean Air Lines*, 814 F. Supp. 592, 599 (E.D.Mich. 1993) (holding that plaintiff could not recover damages under both U.S. and South Korean law); *In re Air Crash Disaster Near Bombay, India on January 1, 1978*, 531 F. Supp. 1175 (W.D.Wash. 1982) (holding that there is no legal basis for plaintiffs' contention that § 762 and § 764 provide cumulative remedies). Because plaintiffs may recover under § 762, they may not use § 764 as a basis for recovery under Korean law. Therefore, this Court rejects plaintiffs' contention that they may recover nonpecuniary damages pursuant to Korean law.

C. *Recovery for Non-Physical Services*

Plaintiffs argue that damages for nonphysical services are recoverable as pecuniary damages under DOHSA. Pursuant to *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 585, *reh'g denied*, 415 U.S. 986 (1974), the minor dependants of a decedent may recover damages for nonphysical services such as nurture, training, education, and guidance under DOHSA. Damages for these nonphysical services are considered pecuniary and thus are available under DOHSA. Adult plaintiffs, such as the ones in the present cases, may not recover on their own behalf pecuniary damages for nonphysical services.

Again, these damages are available only for minor dependents. Accordingly, plaintiffs' damage claims for nonphysical services may proceed on behalf of each decedent's minor dependent; plaintiffs' claims for these damages on their own behalf must be dismissed.

CONCLUSION

Based on the foregoing, defendant's motion to dismiss plaintiffs' claims for loss of society and survivor's grief must be, and is hereby, GRANTED, and these claims are DISMISSED with prejudice.

Defendant's motion to dismiss plaintiffs' claims for the decedents' pre-death pain and suffering must be, and is hereby, DENIED.

Finally, defendant's motion to dismiss plaintiffs' claims for loss of non-physical services is GRANTED, and these claims are DISMISSED with prejudice, except for the claims for loss of non-physical services brought on behalf of the decedents' minor dependents.

SO ORDERED.

/s/ THOMAS C. PLATT
District Judge, U.S.D.C.

Dated: Uniondale, New York
August 28, 1996

Supreme Court, U.S.
FILED
NOV 15 1996
CLERK

(3)

No. 96-623

In The

Supreme Court of the United States

October Term, 1996

KIMBERLY S. SAAVEDRA, as Special Administratrix of The Estate of Masakazu Yamaguchi, et al.,

Petitioners,

v.

KOREAN AIR LINES CO., LTD.,

Respondent.

KIMBERLY S. SAAVEDRA, as Special Administratrix of The Estate of Makoto Okai and Yooko Okai, et al.,

Petitioners,

v.

KOREAN AIR LINES CO., LTD.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF OF PETITIONERS

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8 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 2

I. KAL Does Not Really Oppose the Petition ... 2

II. Petitioner is Not Precluded From Raising the Interplay Between §§ 761/762 and 764 DOHSA in Light of the Holding of the Court Below.. 3

CONCLUSION 5

TABLE OF AUTHORITIES

Page

CASES:

Bickel v. Korean Air Lines, 83 F.3d 127 (6th Cir. 1996), *amended on reh'g*, 96 F.3d 151 (6th Cir. 1996) 2

Forman v. Korean Air Lines, 84 F.3d 446 (D.C. Cir. 1996), *petition for cert. filed sub nom., Korean Air Lines v. Forman*, No. 96-530 (U.S. docketed October 3, 1996) 2

Miles v. Apex Marine Corp., 498 U.S. 19 (1990) 2

Moragne v. States Marine Lines, 398 U.S. 375 (1970) 2

Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974) 2

United States National Bank of Oregon v. Independent Agents, 508 U.S. 439 (1993) 3

Yamaha Motor Corp. v. Calhoun, 116 S. Ct. 619 (1996) 2

Zicherman v. Korean Air Lines, 116 S. Ct. 629 (1996). ..*passim*

TREATIES, STATUTES AND RULES:

Death on the High Seas Act (DOHSA), 46 U.S.C. § 761 *et seq.* 1

Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), reprinted in note following 49 U.S.C. Sec. 1502. Also known as "The Warsaw Treaty." 3

REPLY BRIEF OF PETITIONERS

The Opposition to the Petition ("Opp.") ignores Petitioners' legitimate argument that a general maritime law survival action exists which may be brought co-incident with a wrongful death action under DOHSA.[1] Instead of addressing Petitioner's argument, Korean Air Lines Co., Ltd. ("KAL") attempts to convince this Court to address the issues which it (KAL) wants addressed. It does not really oppose the request for certiorari but wants to align the issues to KAL's definitions of what they are, notwithstanding that KAL failed to cross-petition for writ of certiorari. Respondent argues that the Court should grant the Petition in order to resolve an alleged conflict "as to the proper application and effect of the intervening decision of the Court in *Zicherman*[2] on the recoverability of non-pecuniary damages for pain and suffering under DOHSA." Opp. at 15. However, *Zicherman* only addressed some issues relating to wrongful death remedies under DOHSA. The Petition, on the other hand, challenges the court below as erroneously expanding *Zicherman* to encompass non-wrongful death remedies and to preclude a general maritime survival cause of action for predeath pain and suffering, in direct conflict with the First, Fifth, and Eighth Circuits. Petition at 8-9. The Petition notes that the survival cause of action is different and independent of any wrongful death statute and provides remedies that are different not only in kind (predeath pain and suffering rather than family members' losses)

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[1] Death on the High Seas Act (DOHSA), 46 U.S.C. § 761 *et seq.*

[2] *Zicherman v. Korean Air Lines*, 116 S. Ct. 629 (1996).

but in applicable beneficiaries (the estate of the decedent instead of surviving family members). The Respondent ignores this issue and focuses on the alleged conflict between the court below and the Sixth Circuit in *Bickel v. Korean Air Lines*, 83 F.3d 127 (6th Cir. 1996), *amended on reh'g*, 96 F.3d 151 (6th Cir. 1996) and the District of Columbia Circuit in *Forman v. Korean Air Lines*, 84 F.3d 446 (D.C. Cir. 1996), *petition for cert. filed sub nom., Korean Air Lines v. Forman*, No. 96-530 (U.S., docketed October 3, 1996). No such conflict exists as those cases were decided on procedural grounds. KAL should be precluded from modifying the Petition's issues in its misnamed "Opposition" and the Petition should be granted on the basis of the issues as framed therein.

ARGUMENT

I. KAL Does Not Really Oppose the Petition

KAL does not genuinely oppose the Petition (*see*, Opp. at 7) but wants the issues re-cast on different grounds than as framed in the Petition. To that end, it ignores the issue whether there exists a survival action for predeath pain and suffering under general maritime law developed under an analysis akin to the recognition of a general maritime law death action pursuant to *Moragne v. States Marine Lines*, 398 U.S. 375 (1970). KAL ignores the argument because it cannot deny that the Court has several times either specifically acknowledged (*see, Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 575-76 n. 2 (1974), *Yamaha Motor Corp. v. Calhoun*, 116 S. Ct. 619, 625 n. 7 (1996)) or strongly implied (*see, Miles v. Apex Marine Corp.*, 498 U.S. 19, 34 (1990)) that a survival cause

of action for predeath pain and suffering is a thing apart from a wrongful death cause of action. The argument Petitioner makes, which Respondent ignores, is that, if Article 17 of the Warsaw Convention[3] is merely a pass-through, or *Zicherman* dictates, the courts must apply whatever law would ordinarily be utilized. If there is a general maritime survival cause of action for predeath pain and suffering, as Petitioner urges the Court to acknowledge, then that remedy is available through Article 17 independent of the wrongful death remedies available under DOHSA through Article 17. Thus, Respondent's phraseology of whether *Zicherman* precludes pain and suffering damages under DOHSA (Opp. at 15) misstates the Questions Presented for Review. The Writ should issue on the questions as presented.

II. Petitioner is Not Precluded From Raising the Interplay Between §§ 761/762 and 764 DOHSA in Light of the Holding of the Court Below

As Respondent itself notes:

> "[I]t is well settled that an appellate court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law. *See, United States National Bank of Oregon v. Independent Insurance Agents*, 508 U.S. 439, 446-48 (1993)" Opp. at 14.

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[3] Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), reprinted in note following 49 U.S.C. Sec. 1502. Also known as "The Warsaw Treaty."

That statement is also applicable to the court below's power to apply the proper construction to all of DOHSA, including 46 U.S.C. App. § 764. Given the Court's direction in *Zicherman* that DOHSA applies to the wrongful death measures of damages, the court below retained the independent power to identify and apply the proper construction of governing law (i.e. all of DOHSA) but erroneously refused to do so.

As noted by the parties, after this court decided *Zicherman*, upon request by Korean Air Lines, the court below permitted the parties to submit supplemental briefs addressing the significance of *Zicherman* on the pending appeal (*See* Petition at 4; Opp. at 5). Petitioner argued in supplemental briefs that there was a right to recover damages under § 764 as a pass-through for application of South Korean law in addition to the damages permitted under §§ 761/62, just as Korean Air Lines argued the question of whether there was a legal right to assert a survival action for predeath pain and suffering. The court below improperly permitted Korean Air Lines to pursue its issue, but precluded Petitioner from doing the same with her issue. This Court has authority to address and decide the issue of the proper construction of DOHSA as applied through Article 17.

CONCLUSION

The Court should grant the Petition for Writ of Certiorari in all respects set forth therein and reject the modifications of the issues for review suggested by Respondent.

Dated: November 14, 1996

Respectfully submitted,

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